The IQ Puzzle: What Are We Measuring?

by Jerome Kagan

> The tendency has always been strong to believe that whatever received a name must be an entity of being, having an independent existence of its own. And if no real entity answering to the name could be found, men did not for that reason suppose that none existed, but imagined that it was something peculiarly abstruse and mysterious.

John Stuart Mill may have been thinking of the enigmatic concept of intelligence when he wrote the sentences quoted above because "intelligence" has become one of the most controversial words in our lexicon. It was inevitable that many societies would invent the idea of intelligence, for man requires an explanation for the obvious differences among people in their ability to adapt to the problems posed by particular environments. Intelligence is the psychic analogue of physical endurance. In societies where critical environmental challenges remain relatively constant over time, a social consensus usually exists on what characteristics define a "smart person"—although one culture may emphasize activity level, another, quality of memory, and a third, the capacity for pensive reflection. Less than 100 years ago, Sir Francis Galton believed that intelligence could be measured by evaluating visual and auditory acuity. That definition has been abandoned in favor of size of vocabulary, ability to solve arithmetic problems, and inferential reasoning.

Despite the lack of unanimity among scientists or cultures as to how intelligence should be assessed, most Americans believe that differences in mental capability—no matter what tests are used—are due, in large measure, to biological factors. Hence they are not particular about the quality of the scientific evidence that supports that belief. I hope that this discussion will persuade some readers that there is good reason to doubt the widely publicized statement that 80 percent of intelligence is inherited, and that the evidence surrounding the inheritance of IQ does not permit any strong statements about the degree to which biology or experience contributes to the variation in IQ scores. This approach neither defends social egalitarianism nor evaluates the morality of respectable scientists who have argued strongly for a genetic interpretation. I have examined the same corpus of data studied by Professors Jensen[1], Herrnstein[2], and others who favor a genetic theory, but have come to a different conclusion.

Jerome Kagan, a member of the Committee on Brain Sciences of the National Academy of Sciences, is Professor of Developmental Psychology at Harvard University.

Why IQ Tests?

At the outset, one must ask why IQ tests became the most popular method of measuring intelligence. Many scientists assume a complementary relation between the psychological processes of the mind and the biochemical processes of the brain. Scientists who reject a concept such as "overall efficiency of the brain," however, are less troubled by the concept of "general intellectual ability," and are willing to believe that IQ scores may capture that characteristic. One group of psychologists are openly critical of the idea of general intelligence and favor separate measurement of functions like memory, perception, and reasoning. A second group, led by Professor Jean Piaget, regards use of special rules of reasoning as the best index of intelligence and de-emphasizes the importance of the language skills that comprise the heart of the intelligence test. A final group assumes that the ease with which a child or adult learns a totally new skill or concept should be the essential criterion of

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ABSTRACT

Every school system in the country seeks a way to evaluate its educational effectiveness as well as the academic success and failres of its students. A majority of schools assume that intelligence, and therefore academic success, can be measured. Accordingly, standardized tests are used to determine intellectual capacity and level, and test esults are employed as a basis for classifying and tracking students into various groups. This issue of "Inequality in Education" is designed to analyze the underlying concepts of testing and tracking, and to explore the particular educational inequities which these practices foist upon minority group children. Articles deal with: (1) an examination of the prevailing concept of intelligence and IQ in relation to varied perspectives and cultures; (2) cultural, socioeconomic and racial bias in testing and tracking; (3) a review of some legal cases involving classification in schools; (4) an examination of the history of ability groups, studies about them, and possible ways to restructure classroom grouping to have less detrimental effects on students; (5) the small educational goals of many tracked classrooms and how they relate to the success of a non-tracked special school in Massachusetts; and, (6) the flexible and individualized use of testing and grouping in a program in South Carolina. A Notes and Commentary section contains reports on recent education cases. (Author)

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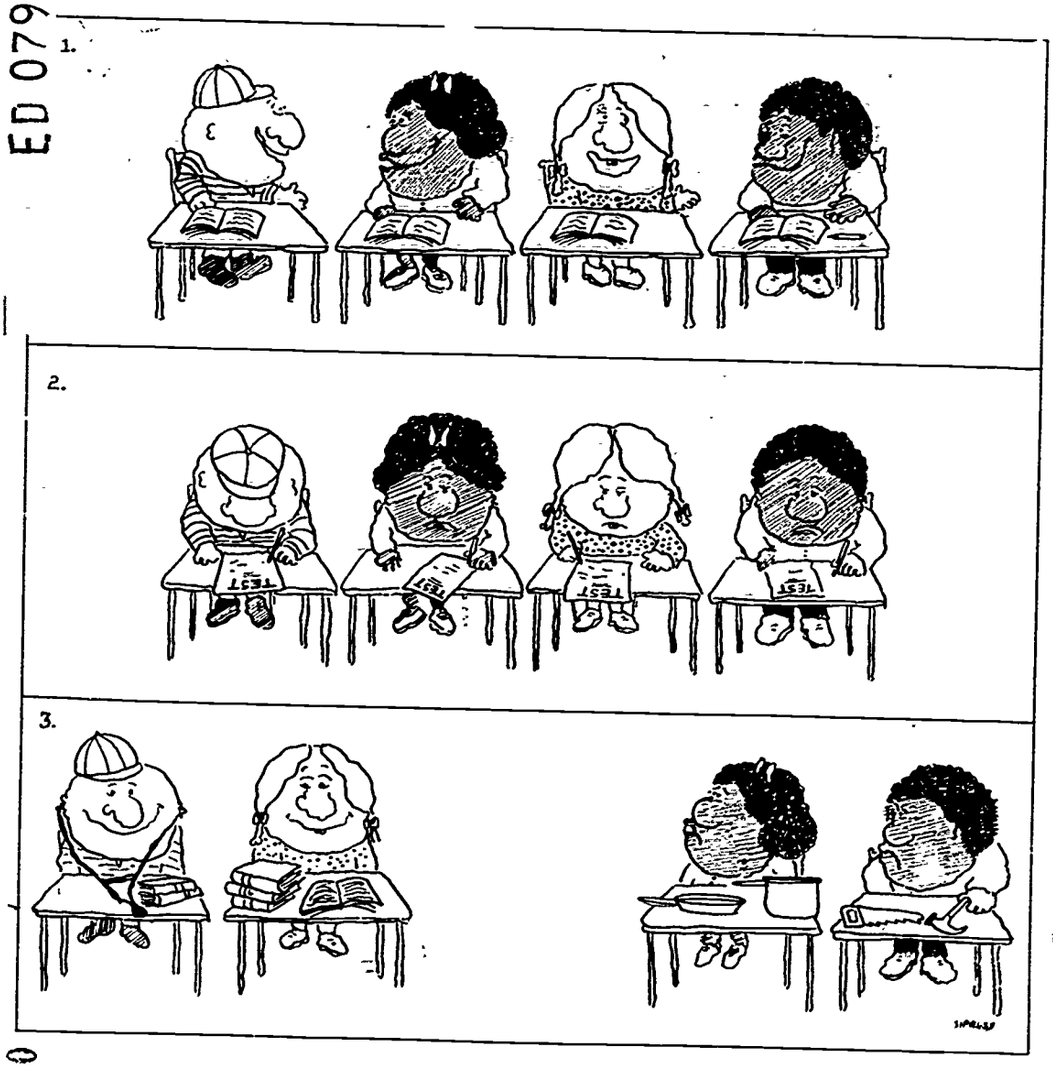

TESTING & TRACKING:
Bias in the Classroom

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Contents

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vocabulary or information tests of the Wechsler Scale and five questions taken from a test devised by Adrian Dove. Dove's questions were selected to be familiar to urban poor blacks and the Wechsler questions to be familiar to middle class white Americans.

Table 1

Wechsler Test

1. Who wrote Hamlet?
2. Who wrote the Iliad?
3. What is the Koran?
4. What does *audacious* mean?
5. What does *plagiarize* mean?

Dove's Test

1. In C.C. Ryder, what does C.C. stand for?
2. What is a gashead?
3. What is Willy Mays' last name?
4. What does "handkerchief head" mean?
5. Whom did "Stagger Lee" kill in the famous blues legend?

It is unreasonable to ask whether high scores on either test measure anything to do with basic mental capacity. A person's score reflects the probability that he has been exposed to the information requested.

Consider a related example. Janet Fjellman worked in Kenya with a group of children living in a rural area and an urban group living in Nairobi. The rural adults make a distinction between domestic and wild animals which adults in Nairobi ignore. When the unschooled rural children were asked to sort an array of animal pictures into conceptually similar categories, they divided them on the basis of domestic versus wild; the city children sorted by color. The assumption behind the scoring and interpretation of intelligence tests would have classified the city children as nonabstract and, by inference, less intelligent than the rural children. Since this decision violates our intuitions concerning the nature of intelligence and the role of schools in promoting abstract thought, we are forced to the reasonable interpretation that differential familiarity with the concept "domestic versus wild animal" was responsible for the products of the two groups. This explanation is supported by the fact that the city children produced more abstract categories when geometric shapes like circles and squares were the materials manipulated.

Cultural Bias

Similarly, if the Wechsler Scales were translated into Spanish, Swahili, and Chinese and given to every 10 year old in Latin America, East Africa, or China, the majority would obtain IQ scores in the mentally retarded range. It seems intuitively incorrect to conclude that most of the children in the world are mentally retarded, with the exception of middle class Americans and Europeans.

Persuasive support for the cultural bias of the test comes from an examination of Wechsler protocols on poor black children who are part of a longitudinal study conducted by the Child Growth and Development Center at Johns Hopkins University under the direction of Dr. Janet Hardy. The Center examined these IQ protocols and noted that many children were failing questions because they did not comprehend the syntax of the question, the pronunciation of words, or the intention of the question. Their answers were reasonable but they received no credit. The staff then performed an experiment. After administering the Wechsler to a large number of these children using standard procedures, they conducted a detailed inquiry to determine, if possible, why the children gave incorrect answers. This confirmed the initial hypothesis that many children had given reasonable replies for which the scoring manual denies credit, or failed to give correct answers because they did not understand the question. As a result many of them obtained artificially lower IQ scores.

The profound cultural bias in the test is perhaps best revealed by answers to the question, "What is the thing to do if a child much smaller than yourself starts to fight with you?" The middle class child, who usually indicates that he would try to avoid a fight, receives maximal credit. Many of the black children said they would retaliate. When asked why, a typical reply was, "My mother say if someone mess with you, you mess 'em back." Clearly, each group is telling the examiner what he believes to be the correct posture in such a conflict. To call the first answer more intelligent than the second is to make mental capacity equivalent to morality.

A second source of error is the result of differential familiarity with the grammar or vocabulary that carries the question. Many

black children who could not answer the inquiry, "What must you do to make water boil?" replied correctly when the examiner said, "How do you boil water?" The poor black child, unfamiliar with the verb form "must you do," behaved as if he were addressed in a foreign language.

A third source of error stems from misperception of the middle class examiner's pronunciation. When asked to define "fur" some said, "That's what happens when you light a match." Clearly the child had interpreted the word to be "fire." When asked to define "sword" their replies suggested that they heard the word "saw." These examples, which comprise only a small proportion of all the sources of error that could be documented, suggest that the IQ test is a seriously biased instrument that almost guarantees that middle class whites will obtain higher scores than any other group in the country. Consequently the more similar people's life experiences, the more similar their IQ scores.

Why Such Confusion?

If this conclusion is intuitively appealing to many people, why do others believe that 80 percent of the variation in intelligence is inherited? There seem to be two reasons for this view. Since the genetic differences among humans probably influence some aspects of mental functioning it seems like a small leap to the stronger statement that differences in IQ are primarily genetic in origin. However true the first statement, the second does not necessarily follow. Heredity also controls the amount and distribution of the hair on our heads, but the distribution of facial hair is primarily attributable to cultural mores, not biology.

A more serious basis for the genetic argument is the undeniable fact that the closer the genetic relation between two people, the more similar their IQs. Since this fact is the principal rational support for the conclusion that a person's IQ is 80 percent heredity, we must examine the bases for that fact to see if that inference is reasonable.

In order to appreciate the argument it is necessary to present some statistics. When the IQs of parents and children or brothers and sisters are correlated, the values tend to hover near the theoretically expected value of 0.5. Correlations between the IQs of pairs of genetically unrelated people chosen at random are close to the theoretically expected value of 0.0. Although the difference between 0.5 and 0.0 may seem sufficient to implicate genetics, one must not forget that in most of these studies the parents, children and siblings resided in the same home, neighborhood and community and, hence, shared similar values, motives and knowledge. On this basis alone we would expect these genetically related people to be more similar in IQ.

Scientists quickly reply that the more critical tests of the genetic hypothesis are contained in comparisons of the IQ scores of identical and nonidentical twins reared in the same environment, and the scores of identical twins reared in different environments. It is true that the IQs of identical twins, who have the same set of genes, are more similar than those of nonidentical twins who are of different genetic structure. However, Dr. Richard Smith[5], who compared 90 pairs of identical and 74 pairs of nonidentical twins, found that the identical twins, especially females, were also more similar in behaviors that are likely to be the result of similar experience, not heredity. For example, identical twins were more likely to study and do their homework together, to have the same set of very close friends, and to have similar food preferences. Smith concluded, "... there is a difference in the overall environment of the two types of twins which will, in turn, influence the intrapair differences. . . . It seems evident that the assumption of a common environment for monozygotic [identical] and dizygotic [nonidentical] twins is of doubtful validity and, therefore, the role of environment needs to be more fully evaluated in twin studies."

However, since the IQs of identical twins reared in different environments are also more similar than those of people selected at random, the role of heredity seems certain and the role of environment ambiguous. But that conclusion requires a condition that is rarely met; namely, that the twins be reared in different home environments and encounter radically different values and treatments. Since officials responsible for the placing of children in foster homes try to place them in similar settings, it is likely that most of the twin pairs were sent to families of similar religious, linguistic, racial

Introduction

Every school system in the country seeks a way to evaluate its educational effectiveness as well as the academic successes and failures of its students. A majority of schools assume that intelligence, and therefore academic success, can be measured. Accordingly, standardized tests are used to determine intellectual capacity and level, and test results are employed as a basis for classifying and tracking students into various groups. This issue of *Inequality in Education* is designed to analyze the underlying concepts of testing and tracking, and to explore the particular educational inequities which these practices foist upon minority group children.

In "The IQ Puzzle: What Are We Measuring?" Jerome Kagan provides an opportunity to examine the prevailing concept of intelligence and IQ in relation to varied perspectives and cultures. Winifred Green discusses cultural, socioeconomic and racial bias in testing and tracking in "Separate and Unequal Again." In a review of some legal cases involving classification in schools, Merle McClung offers a guide (particularly for attorneys) for challenging both the bases and practices of educational labels. Dr. Warren Findley ("How Ability Grouping Fails") examines the history of ability groups, analyzes studies about them, and suggests possible ways to restructure classroom grouping to have less detrimental effects on students. Psychiatrist and school director Shepard Ginandes points out the narrow educational goals of many tracked classrooms and relates the success of a non-tracked special school in Massachusetts. The flexible and individualized use of testing and grouping in the Individually Guided Education program in South Carolina is discussed by Edith W. Jensen in "An Alternative That's Working."

The Notes and Commentary section, containing reports on recent education cases, includes a special note by Center Staff Attorney Robert Pressman which summarizes recent student rights cases and decisions.

The American public school system, which has a basic responsibility for instilling in its students an appreciation of our democratic system, is a peculiarly appropriate place for the use of fundamentally fair procedures.

District Judge Garrity

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Why IQ Tests?

At the outset, one must ask why IQ tests became the most popular method of measuring intelligence. Many scientists assume a complementary relation between the psychological processes of the mind and the biochemical processes of the brain. Scientists who reject a concept such as "overall efficiency of the brain," however, are less troubled by the concept of "general intellectual ability," and are willing to believe that IQ scores may capture that characteristic. One group of psychologists are openly critical of the idea of general intelligence and favor separate measurement of functions like memory, perception, and reasoning. A second group, led by Professor Jean Piaget, regards use of special rules of reasoning as the best index of intelligence and de-emphasizes the importance of the language skills that comprise the heart of the intelligence test. A final group assumes that the ease with which a child or adult learns a totally new skill or concept should be the essential criterion of

intelligence—and IQ tests do not assess that quality.

Because scientists hold varied conceptions of intelligence one would think that different, competing tests of this attribute would have been developed. Why, then, does one test domi..ate? The answer goes back to the first decade of this century when school progress became the criterion against which the value of the intelligence test would be judged. Once that decision was made, and it was made self-consciously by the inventors of the test, the history of the last sixty years was inevitable. Since questions that did not predict progress in reading, arithmetic, and composition were purposely omitted from the intelligence test, it is not surprising that a high IQ score predicts school and college grades. The test was constructed to guarantee that relation. Since satisfactory grades are a major requirement for college admission and subsequent entry into professional vocations that allow accumulation of status, power, and wealth, it is again necessarily true that the IQ score would predict a more successful adaptation in our society. However, the original basis for selecting the test questions has been forgotten. The causal relation between IQ and eventual success has been turned on its head and it is argued that teachers, mayors, and lawyers have higher IQs than cab drivers, plumbers, or house painters because they possess biologically better nervous systems, rather than because the circumstances of their rearing familiarized them with the language and class of problem presented on the IQ test.

Anatomy of the Measure

One must examine the anatomy of the IQ test to determine the plausibility of the statement that correct answers measure a basic capacity to learn and manipulate new ideas, to remember past experience, and to reason coherently—processes often regarded as the essence of intelligence. The two most popular intelligence tests are the Stanford-Binet, used most often from age two through adolescence, and the Wechsler Scales, used from age five through adulthood. Because the tests are similar in content, a discussion of one, the Wechsler Scale, which is more widely used and covers a broader age range, will serve our purpose here.

The Wechsler Scale consists of 11 sub-tests, six of which seem to be more verbal in nature than the remaining five. All eleven tests use words, pictures, and materials that are more familiar to middle class white Americans than to any other social or ethnic group. Three of the sub-tests require knowledge of factual information—the definition of a word, an author, or a socially acceptable rule of behavior. Other tests require the person to remember a series of numbers, to detect the similarity between two concepts, to discover a missing element in a line drawing, to arrange blocks in a design, to arrange pictures into a coherent story, to solve a puzzle and, finally, to decode and copy a series of simple designs. Scores on the

Photo: Gail Levin

vocabulary and information tests—which are most predictive of the total IQ score—are most likely to be influenced by what one reads and to whom one talks because they ask only for factual information. The tests that require the most active thought (constructing designs, remembering numbers, and solving puzzles) have the lowest relation with the total IQ and show less evidence of genetic control than knowledge of facts.[3] This creates the first paradox. If IQ is a biologically influenced characteristic, why is knowledge of arbitrary items of factual information the best index of that dynamic attribute?

How Do You Talk?

Table 1 lists five questions taken from the

and social class backg ound and, as a result, were exposed to similar experiences.

There are four major studies of identical twins reared in different homes.[6] Cyril Burt[7], the author of one of these studies, reported information on the families to which the twin pairs were sent. 41 percent of the twin pairs grew up in homes that were highly similar socioeconomically; only 26 percent (12 twin pairs) were sent to families markedly different in social class. In 9 of these 12 pairs the twin who lived in the upper middle class home had a higher IQ than the twin adopted by the working class home.

In an earlier study, only . of 19 pairs of separated twins (21 percent) grew up in homes with large differences in educational attainment. In one pair, one girl had five years of schooling, her sister three years of college. In two pairs, one finished high school, the other the eighth grade. In the most dramatic pair, one sister with an IQ of 92 only finished third grade; the other with an IQ of 116 had a college degree. This makes it less clear that the similarity in IQ score between identical twins reared apart is primarily a result of common heredity.

Effects of Environment

Robert McCall of the Fels Research Institute has found that the correlation between pairs of genetically unrelated white children from the same social class is not 0.0, but 0.3. Since the correlation between brothers and sisters living in the same home is only 0.5, it is reasonable to suggest that the similarity in IQ scores between siblings or separated twins should not be interpreted as primarily genetic in origin. There is recent analyzation of data that provides additional support for this view. The data were supplied by Drs. Janet Hardy and Doris Welcher of the Johns Hopkins Child Growth and Development Study, who selected from their records a random sample of over 400 children who had taken a Wechsler IQ test when they were about age 7. Most were from poor black families who resided in a relatively homogeneous ghetto environment. When pairs of black children were selected at random, the correlation between their IQ scores was low, and the average difference in their IQs a little

Photo: Gail Levin

over 12 points. However, when pairs were selected so that each pair was the same sex, and their mothers of similar age and years of education, the average difference in IQ dropped to 9 points, only a little larger than the 7 point difference reported for the 122 pairs of identical twins reared in different homes, and smaller than the 14 point difference found for one set of twins when IQ equivalents for their scores were computed.[8] Among these genetically unrelated pairs of children matched only on maternal age and education, 43 percent had IQ differences of 6 points or less. This degree of similarity approaches that found for two of the studies of separated identical twins, where the comparable proportions were 47 and 50 percent. Since matching genetically unrelated children on only maternal age and schooling markedly increased the similarity of their IQs, it is reasonable to argue that the similar IQ scores of separated twins could result partially from placement in similar home environments.

Reasoning further, assume that number of years in school (which typically varied between seven and twelve years for this ghetto population) reflects primarily the mother's concern with traditional academic accomplishment, rather than her biological ability to do school work. If that motivation were reflected in the treatment of her children, the similarity in IQ for these matched pairs would argue for the profound effect of environment on IQ.

Those who favor the genetic hypothesis reply that social class is correlated with IQ because biologically more intelligent people rise in social class. Matching children on mother's education, therefore, is equivalent to matching them on basic intelligence. But this ignores the fact that the first generation of Catholic and Jewish immigrants who came to America typically did not attain any more formal schooling or higher IQ scores than contemporary blacks, Puerto Ricans, and Mexican-Americans. Today the distribution of IQ scores of Jews and Catholics is similar to that of the dominant group of white Protestants. Since it is unlikely that the "genes governing intelligence" in these ethnic groups have changed during the last fifty years, it is fair to question the assumption that a low position on the social scale at a particular point in time results primarily from hereditary factors.

Moreover, if low social class membership were genetically determined, we should not necessarily see class differences in the parental treatment of young children that were theoretically related to the motives and skills reflected in IQ scores. There is no reason why the genes for class position should be correlated with the specific behavior a mother displays toward her infant and young child.

Recent studies have shown dramatic differences in a mother's treatment of her child, depending on education and her husband's occupation; these differences imply that better educated parents create experiences for their children that facilitate good performance on IQ tests. Steven Tulkin[9] observed white working and middle class mothers of 10 month old infants and found that middle class mothers engaged in reciprocal verbal interaction with their infants more often than working class mothers. It is reasonable to assume that this language stimulation would facilitate the high vocabulary scores middle class children attain on an IQ test.

Several years ago I observed two year old children from working and middle class homes and found that the working class mothers issued more arbitrary prohibitions and were more likely to remind their children of their faults and the possibility of potential punishment.[10] This experience is likely to impair self-confidence—a personality characteristic that affects performance on IQ tests. These results suggest that the relation between parental social class and IQ reflects the role of different experiences. They also weaken the view that social class and IQ are correlated because the middle class contains a greater proportion of people with biologically better nervous systems.

A third source of vulnerability in the genetic argument centers on the legitimacy of the *heritability ratio* (what proportion of IQ scores seems to be due to heredity) to assess the magnitude of hereditary influence. Estimates of the heritability ratio are usually based on the difference in the IQ correlation between identical and nonidentical twins. The ratio is based on the assumption that the causes of variation in IQ can be added together, some due to environment and some due to heredity. A serious criticism of the use of the heritability ratio is that it ignores the likely possibility that heredity and environment might be highly correlated.

There is good reason to believe that aspects of the young child's temperament are treated differently by middle and lower class parents, and, as a result, the qualities measured by IQ tests are enhanced in middle class homes and, perhaps, suppressed in working class homes. If this were true, current heritability values might be spuriously high.

Consider a concrete illustration of this issue. I recently completed a longitudinal study of a large group of first-born white children who were followed from their fourth through their 27th month of life.[1] There was a major difference among the 4 month olds in the tendency to babble spontaneously—some infants were extremely quiet while others cooed continuously. Assume that biological factors are partially responsible for this variation in infant "vocalization." Observations in the homes of these children revealed that college educated mothers were much more responsive to their infants' babbling than mothers with less than a high school education. The middle class mothers talked back to their infants and long reciprocal dialogues ensued. At 27 months, the girls who were the most talkative and had the largest vocabularies (by inference, the highest IQs) had been highly vocal infants reared by college educated mothers. Highly vocal infants raised by lower middle class mothers were significantly less proficient verbally.

Since social class is typically correlated with IQ score it is reasonable to suggest that the heritability values, which are interpreted as reflecting genetic factors, are artificially inflated by the strong relationship between particular temperamental traits and social class differences in parental responsivity to these traits.

There are, therefore, three bases for doubting the provocative statement that heredity accounts for most of the variation in IQ score. (1) The IQ test is a culturally biased instrument; (2) the similar IQ scores of genetically related people can be simulated in genetically unrelated people who live in similar environments; and (3) the probable correlation between heredity and environment is ignored in current interpretations of the heritability ratio.

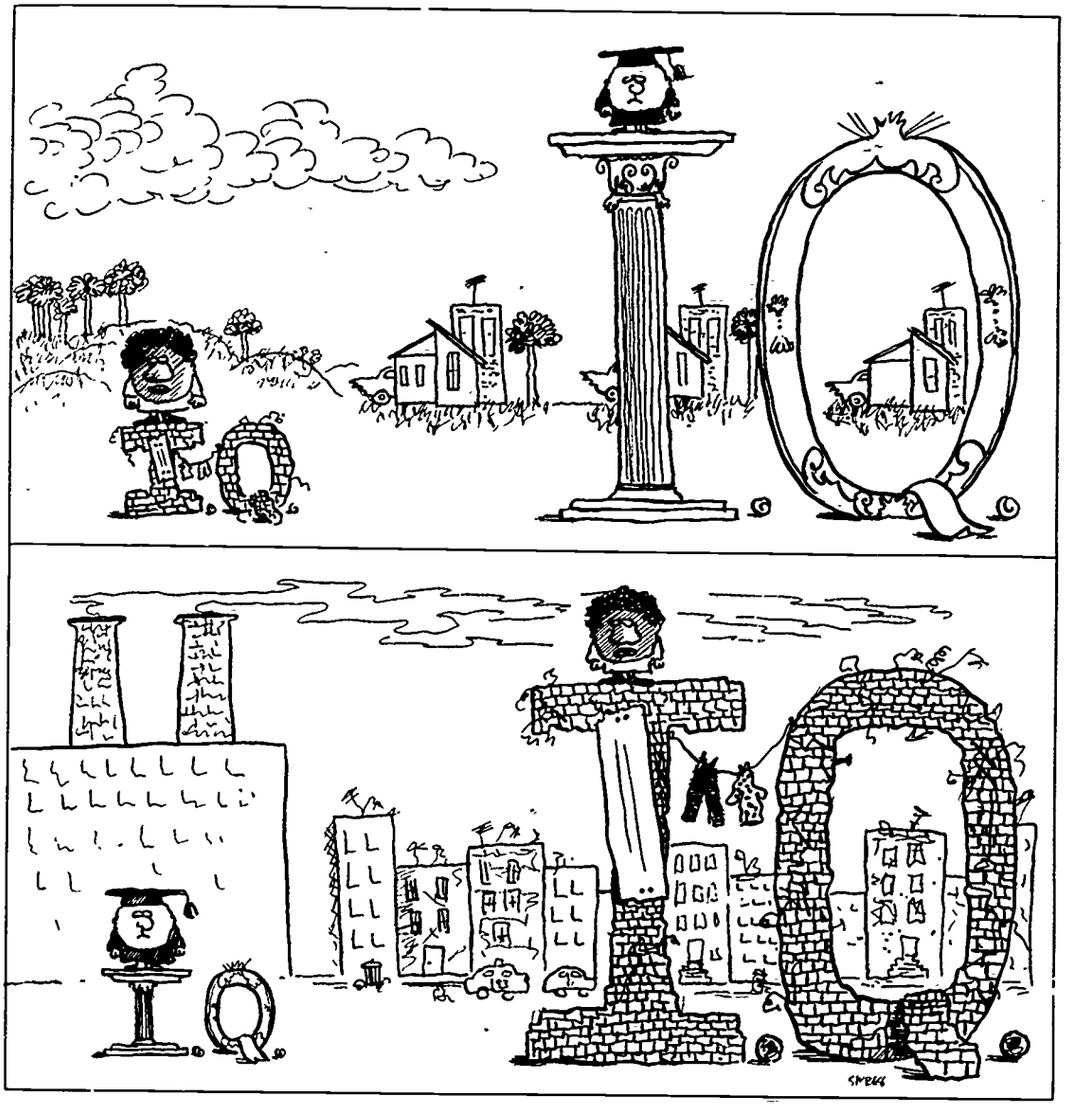
The Persistent Myth

Why, then, do many scientists and parents continue to believe in the inheritance of IQ (excluding the small proportion of children with specific forms of severe mental retardation due to known genetic factors)? Perhaps one reason derives from the fact that every society believes that a small group must possess some power over the much larger citizenry in order to maintain stability. In most instances the psychological traits of those in power become, with time, the explanation for the differences in status and privilege. Tenth-century Europe awarded power to those who were assumed to be more religious than their brothers. The presumption of a capacity for more intense religiosity provided a rationale that allowed the larger society to accept the fact that a privileged few were permitted entry into marble halls. In the isolated Mayan Indian village in which I am working, the men tell us that women must never be given responsibility because they are "born fearful" and cannot make decisions. Being born male is the village's explanation of differential ability to wield power. Contemporary American society explains its unequal distribution of status as a product of differential intelligence, rather than innate religiosity or sex, and it makes the same genetic arguments. Intelligence is America's modern interpretation of saintliness, religiosity, courage or moral intensity, and it has become the basis for the awarding of prizes.

The Meaning of Intelligence

What then should we conclude about the meaning of intelligence and the causes of the obvious differences among people in the efficiency and quality of their language, reasoning, and ability to solve challenging problems? I believe that the basic capacity to remember, to symbolize, to reason, to abstract and to categorize is present in all human beings, and there is no firm evidence to challenge that statement. In fact, my recent work in Guatemala suggests that 10 year old children living in extremely isolated agricultural villages show a capacity for symbolism, memory and conceptual inference completely comparable to that displayed by middle class American children.

It is more useful to talk about competence in separate mental processes that comprise mental life rather than a generalized intelligence. Some people possess an excellent memory for visual



scenes but have difficulty learning a new language. J.P. Guilford[12] has argued for many years that a mental profile be assigned to each person rather than a summary number that is presumed to reflect his overall mental prowess. The notion of general intelligence is theoretically confusing and distorting of the true nature of cognitive functioning. It should be replaced with a view which delineates basic cognitive process (like memory and inference) from acquired knowledge. Second, it must be recognized that the honing of competence and the filling of a reservoir of knowledge for a particular population are totally dependent on the demands that the child's culture makes of him and his opportunity to perfect his talents. In short, intellectual capability must be viewed through *relativistic lenses*.

The rural Guatemalan child knows less than the American child about planes, computers, and fractions, but he knows much more about how to make rope and tortillas, how to tell the weather from cloud formations, and how to burn an old milpa for the June planting. The American middle class child knows how to play chess and scrabble; the poor ghetto child knows how to play the "dozens" and stick ball. Each knows what is necessary for his life space. There are only a few incompetent children in the world if you classify them from the perspective of the community of adaptation, but millions of incompetent children if you classify them from the perspective of another society.

As for the bases of individual differences in quality of thought, I remain puzzled. *Existing scientific data do not permit strong statements about the degree of genetic or environmental control of intelligence.* The differences in IQ between blacks and whites can best be explained as a result of the serious cultural bias in the tests. The high degree of similarity between genetically related people could be the partial product of similar experience. Future research may reveal that heredity makes a major contribution to the different profiles of human talent. But available knowledge is simply too faulty to permit any firm conclusion.

Those who must have an answer to this question will have to be more patient. When I was a student, Down's syndrome (then called Mongolism) was regarded as a nongenetic trait. We now know that this defect is caused by a chromosomal anomaly. Nature is an elusive teacher and we must not allow what we may want to believe to interfere with a clear understanding of the messages she has supplied us up to now.

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Separate and Unequal Again

by Winifred Green

Sergeant Moses Williams, a member of the police force in Tallulah, Louisiana, and a black parent long active in the struggle for civil rights, told me: "Giving those tests and then placing children in groups is for one purpose and one purpose *only* and that is to segregate. Once you put a child in that low group there is no way for him to advance himself. You know some of our children may be a little slow, but they all can learn."

And two weeks later, I talked with a middle class white mother in a suburban school district in the urban South, who said: "John is in his eleventh year of school and just this year, because he has two teachers who have confidence in him, he is beginning to get out of the box he was put in in elementary school because he was tracked." She went on to say that she had no worries about her own child because of the support he received at home and that he would be ok; but what, she asked, about the ones who don't get the support at home?

The effects of testing and the inevitable result of classification cut across race and class. They touch all children: black, white, middle class, rich and poor. But it is the minorities and the poor who suffer most from this device which says, no matter how sophisticated the language, "Some are better than others."

I would like to tell you about some of the children with whom I have worked, and how the current definition of intelligence and the use of testing have affected their lives. Then I will suggest some of the ways I think private groups (civic, foundations, churches, and others) can be involved in solving the problem.

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We are a nation that gives lipservice to how much we value our children. How often have we heard that children are our nation's greatest resource? If we examine the facts, the statistics, and the children that make up these statistics, we find that it is not true that the United States is a child-oriented nation. Children are the unrecognized, neglected, and mistreated minority in our country. It is time to start becoming aware of how our children are mishandled.

Is This Quality Education?

The long struggle for equal educational opportunity has led those concerned with change in this country to examine what is meant when one speaks of quality education. A staff member of the American Friends Service Committee (AFSC) once defined quality education as the process that "gives the student the basic skills which he needs for the great range of opportunities before him. It equips him with the tools so that he, not our society, can determine what he wants to do with his life and will prepare him well to take the next step toward that goal."

Are testing and classification procedures consistent with the aim of increasing these options for children? While I am not qualified to speak of the validity of particular tests, I believe I am well qualified to talk about what I have seen as the results of tests in many Southern school systems and to tell you what the "test users," the students themselves, say about tests. Conversations with students in special education classes in four Georgia school districts that range from 40% to 65% black indicated over and over that the students felt that they would function better in heterogeneous classes — or, as they put it, with other students not on their "level."

Here are a few of their comments:
Q. Why were you placed in special education?
A. I took a test and my teacher said I did real

bad and was assigned to this class.

Q. Do you think your work has improved since you've been in this class?

A. No! They give us some special ways to do our work but they only confuse me.

Q. Have you told your teacher or counselor how you feel?

A. What good would that do? They don't care, all they gonna do is start talking that stuff about a test. Don't nobody care about *us.*

One student felt powerless and even viewed herself as inferior as a result of the tests:

Q. Why were you assigned to special education classes?

A. They gave all of us tests and the dumb students was put in these kind of classes.

And another student: "I ain't dumb! They gave me a test but that don't mean nothing. I just mark them little dots as soon as I can."

The third group of students seems to reject their status in these classes. A senior in rural Georgia says: "These classes are not good and a trick. They just trying to make us look dumb. The teacher seems to think we are not good. She gives us a lot of what I call busy work. In order to force her to work with us some of us bother her by going to her desk for help. At the end of the period we play games. Most of these games are silly so we do a lot of complaining. She's always telling us we have a discipline problem."

Separate and Unequal Again

I cannot support testing and grouping for students such as these because experience leads me to believe that grouping reinforces the effects of years of discriminatory treatment in the education of black children — locking them into classroom situations where curriculum, materials, teacher expectation and the resulting stigmas and hopelessness are the same or worse than the days of separate but unequal schools. What we have now for many black, Chicano and poor children is separate and very unequal classrooms with little if any hope of escape.

A brief history of the practices leading up to a current suit [*Simpkins* v. *The Consolidated Sch. Dist. of Aiken County*, C.A. No. 71-784 (D.S.C., July 28, 1972) (preliminary injunction denied August 19, 1971; now pending in federal district court)] against the Consolidated School District of Aiken County, South Carolina demonstrates how testing and ability grouping can affect resegregation in desegregated schools. Students in Aiken are grouped on the basis of standardized test scores and teacher recommendations. During background investigation for the litigation in Aiken, two teachers at different secondary schools reported to attorneys that they had been informed by their department heads to give their low groups minimum scores on the teacher recommendation form, and to give high groups maximum scores. This could guarantee that a student would be locked into his group, whatever its level.

Another insidious aspect of grouping in Aiken is the altering of grades on students' permanent records. Students in high sections have their averages raised a letter grade on their permanent record; students in average sections retain the grades they make; and low group students have their averages lowered a grade. There is no formal policy for moving students upward, and little evidence that there ever is any upward movement. No one is motivated when the high groups can't lose, and the low groups can't win. And in case high school students don't recognize themselves as dummies, or geniuses, it's marked for them on their report cards. High group students' cards are clearly marked "plus," and low groups' marked with "minuses." Thus the terms plus and minus become common references to children in those groups among both teachers and students!

These discriminatory practices are not limited to high school grouping. In the critical elementary years students are tracked at the same level in all subjects; they are not allowed the privilege of doing well in language arts if they test low in arithmetic. And during one year after desegregation, lower groups at one junior high school were segregated by sex.

The Way to Foil Integration

I have never seen grouping operate without students feeling that it was discriminatory. The report *The Status of School Desegregation, 1970,* for which we monitored 467 school districts in the South, reported that 35% of the high school and 60% of the elementary school classroom segregation was defended on the basis of tests. Usually tests were administered for the first time when desegregation occurred. Higher tracks were predominantly white and

had white teachers; lower tracks were predominantly black and had black teachers. We as parents, teachers and citizens may call this special education, but the kids call it "the dumb class," or "the slow ones," or "those idiots in Miss Smith's class who can't read."

Grouping insures that integration never really takes place. Students do not get to know one another, and in the context in which they attend school together, old stereotypes are reinforced. And when I speak of integration, I don't mean just black and white, but include socioeconomic integration as well.

I was educated in an all-white public school in the South. In my school we had the redbirds and the bluebirds. It took until the second year before I figured out that the redbirds were all like me — we all lived in the same neighborhood, had "nicer clothes," and were the ones called on by the teacher to erase the board or run errands. We never said things like "I ain't done nothing." By the third or fourth grade these classifications had come to mean that we—the redbirds—were the smart ones, and the bluebirds—whose folks worked in the mill—were just plain dumb. I suppose it is not necessary to add that we redbirds went on to become the ones who made A's, were class officers, cheerleaders, and got the scholarships to college.

How Private Organizations Can Help

For whites, for blacks—rich or poor—tracking, ability grouping, or classification is not in my opinion working to equip students to build a just and free society for all. What can private organizations do? The churches, corporations, foundations, and citizen groups all must join in the search for the long-range answers; but while we are doing this we must speak to the immediate needs of children now in our public schools.

First, we need to know the facts. If our systems track students, how many of them are misclassified? How many are like the child we discovered last year who was placed in a slow class by clerical error? His teachers estimated that it would take several months of special help to bring his work up to the level of his fellow second graders. In that same system, the "smart section" had an average class size of 22 and the slow class 27. It seemed to guarantee the failure of the "slow" students by giving them less attention than the "smart" students.

Second, groups and individuals who can identify grouping and testing problems and solutions need support. Of course these groups need funds to operate, but they also need other groups to be a part of defining the problem and finding the solution. We must seek to broaden the constituency of those concerned with the process of what makes a quality education.

Third, we must provide funds and technical assistance to community groups and school systems which want to design model programs that can serve as an alternative to grouping of students.

Fourth, if testing is to have a place in our schools, we must support research to develop fair testing methods for minorities.

The Children's Defense Fund

Fifth, the AFSC is going to be working on the problems of classification of children in the public schools and in other institutions along with a newly formed organization called the Children's Defense Fund (CDF). The Children's Defense Fund will focus solely upon the conditions and rights of children in America. CDF's first priorities will be: (1) to establish the right to an education for the thousands of children who are excluded from all publicly supported educational opportunities, in the schools or elsewhere, as well as for those who are wrongfully assigned to "special education" classes within the public schools; (2) to challenge the processes by which children are classified, separated and confined; and (3) to challenge the custodial warehousing of children in a range of institutions and seek to establish minimal rights to treatment and education for the institutionalized child. CDF is concerned with establishing a basic floor of decency for every child. This concern, like that of the AFSC and many other groups of Americans, was expressed recently by a staff member who said that he might have bought too much of the American Dream he learned about in civics class in Mississippi, but he felt there were certain rights guaranteed to us by our government. He said the people he knew didn't want a handout — they wanted a chance to be a part of this country.

To make that dream become a reality, we must all be involved in the struggle for equal educational opportunity that does not classify and demoralize children.

School Classification:
SOME LEGAL APPROACHES TO LABELS

by **Merle McClung**

The harm which is inflicted upon children when schools sort and label them for "educational" purposes has been documented by many studies.[1] Labels stigmatize some children as inferior, limit exposure and interaction between children with different labels, and narrow their social and occupational options after school. The result is a publicly supported "program of apartheid according to social class"[2] within most of our schools.

Relatively few cases have been filed challenging the labels applied to children, however. Perhaps one reason is the belief that the issues are social or educational rather than legal. Because this belief is to a large extent ill-founded, this article is an attempt to formulate a legal framework to aid lawyers who are considering various legal challenges to labels.

Whenever the schools "classify" children by putting a label on them — whether that label be "uneducable," "mentally retarded," "emotionally disturbed," "married," "hyperkinetic," "vocational," "general," "standard" or "redbird" — lawyers should question whether that classification offends the due process and equal protection clauses of the federal constitution (or comparable state constitutional and statutory provisions). At a minimum, lawyers will want to argue that their clients must be afforded procedural safeguards which insure that any label with important consequences has been fairly and accurately applied. In some instances, lawyers may also want to attack the label itself. Thus a section on *substantive* challenges follows the *procedural* one.

I. PROCEDURAL SAFEGUARDS

A. Present Procedural Protection for Exclusions and Special Education Transfers.

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Procedural safeguards for students in public schools have been developed mainly in the context of *exclusion* from school. Thus expulsions, or suspensions for "substantial" periods of time (variously interpreted as between two and ten days),[3] from so important a public good as education must now be preceded by a due process hearing.[4] The cases providing similar procedural protections before a transfer or a label is effected *within* a school (from a regular to a special class) were developed in the context of total exclusion of handicapped children. Ironically, these procedural protections apply to a labeling decision which is often the most easily justified by the school — special education for handicapped children.

The procedural foundation was laid in *Pennsylvania Association of Retarded Children* v. *Commonwealth of Pennsylvania, [PARC]* [344 F. Supp. 1257 (E.D.Pa. 1971)], a consent agreement providing that notice and a hearing must be accorded any allegedly mentally retarded child recommended for any fundamental change in educational status. The plaintiffs were severely retarded children. Many of them were not toilet trained, ambulatory or verbal, and thus, even given the important presumption of regular class placement, were obviously not likely candidates to fit in well and benefit from a regular class. Nonetheless, the court agreed that such children were entitled to a full due process hearing before being assigned to special classes. The subsequent landmark decision in *Mills* v. *D.C. Board of Education* [348 F. Supp 866 (D.D.C. 1972)], which adopted procedural safeguards similar to those in *PARC*, included plaintiffs who represented the whole spectrum of "exceptional" children (from children labeled "severely retarded" to those with "behavior problems"). Judge Waddy specifically held that "Due process of law requires a hearing prior to . . . classification into a special program."[5] The full panoply of

procedural safeguards provided by *Mills* is set off in the accompanying box to illustrate a possible procedural model for all kinds of school placement.[6]

The appointment of an independent hearing examiner (Section 13-e-11), the presumption of placement in a regular class (13a), and shifting the burden of proof to the school (13-e-8) were all recognized by Judge Waddy as necessary to insure proper placement, and lawyers should argue for similar procedural elements when challenging the propriety of any school classification.[7] The presumption of a regular class, however, does not preclude a parent or child from requesting a hearing to effect the transfer of a child from a regular to a special class (Section 13c). Because many parents seek transfers to special classes for children with special needs that cannot be met in a regular class, another alternative is to argue for a presumption in favor of the class preferred by the parent and child, with the school having the burden of proving that the student will receive greater benefit from the challenged placement.[8]

Also noteworthy is Section 2(f), which gives the parent and legal counsel the right to examine all records and evidence upon which the proposed action is based. Sometimes school officials resist parental access to school records on the grounds that they contain personal data about parents which is (1) available from physicians, psychiatrists, and other professionals only on a confidential basis, and (2) harmful to the child if discovered by the parent. This argument has some force, especially in cases of an emotionally disturbed child who may be recommended by professionals for residential placement away from damaging parental influence. Lawyers, however, must insist upon access to all information upon which a placement is based. Much of the information about parents and children which is now collected and recorded by schools should not be maintained without notice and opportunity to challenge.[9] More importantly, the right to challenge a proposed educational placement is meaningless if the school can withhold information upon which the placement is based. If the school or lawyer believe that information in school records creates a genuine conflict between the parent and the child, they should insist upon separate representation for the child.[10]

Misclassified Children

As mentioned above, the school's classification of a child as exceptional and in need of special education is the area in which the school's labeling process is most often justified. Most of the named plaintiffs in *PARC* and *Mills* appeared to need special education, and to be incapable of benefiting from a regular education.[11] Providing a due process hearing before classifying a student into a special program, however, is crucial for large numbers of misclassified and misplaced children.

For example, the named plaintiffs in *Mills* who are labeled "behavior problems" might represent a group of children who could and should function in a regular class, but are pushed into the special education "dumping ground" to relieve the teacher of the problems of dealing with a difficult but normal child. This tendency, perhaps natural but certainly not justifiable, is evidenced by the fact that a much higher percentage of boys than girls is often found in special education classes. The incidence of actual handicap between the sexes is about equal, but boys "act up" more and thus are transferred out of regular classes more often.[12]

The school administration does not provide an adequate check on this tendency of many teachers to transfer a child for their own convenience rather than the child's needs. Often the principal will share the teacher's attitude. Furthermore, schools often receive state and federal benefits geared to the number of handicapped children served in special classes. This financial benefit can deflate the school's incentive to question the teacher's recommendation of special placement. Children in this situation clearly need an advocate and the right to a hearing to challenge the classification.

A related and alarming development is that some schools condition continuation in a regular or special class upon parental consent to the use of behavior-modifying drugs on the child.[13] At one time tranquilizers were often prescribed to calm hyperkinetic children, but now stimulant drugs are in vogue because some studies have found that amphetamines and other stimulant drugs paradoxically increase attention span.[14] Although there are very few follow-up studies of the side effects

The Due Process Hearing Provided by Mills v. D.C. Board of Education

13. Hearing Procedures

a Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

b. Before placing a member of the class in such a program, defendants shall notify his parent or guardian of the proposed educational placement, the reasons therefor, and the right to a hearing before a Hearing Officer if there is an objection to the placement proposed. Any such hearing shall be held in accordance with the provisions of Paragraph 13.e, below.

c. Hereafter, children who are residents of the District of Columbia and are thought by any of the defendants, or by officials, parents or guardians, to be in need of a program of special education, shall neither be placed in, transferred from or to, nor denied placement in such a program unless defendants shall have first notified their parents or guardians of such proposed placement, transfer or denial, the reasons therefor, and of the right to a hearing before a Hearing Officer if there is an objection to the placement, transfer or denial of placement. Any such hearings shall be held in accordance with the provisions of Paragraph 13.e, below.

d. Defendants shall not, on grounds of discipline, cause the exclusion, suspension, expulsion, postponement, inter-school transfer, or any other denial of access to regular instruction in the public schools to any child for more than two days without first notifying the child's parent or guardian of such proposed action, the reasons therefor, and of the hearing before a Hearing Officer....

e. Whenever defendants take action regarding a child's placement, denial of placement, or transfer, as described in Paragraphs 13.b or 13.c, above, the following procedures shall be followed.

(1) Notice required hereinbefore shall be given in writing by registered mail to the parent or guardian of the child.

(2) Such notice shall:
   (a) describe the proposed action in detail;
   (b) clearly state the specific and complete reasons for the proposed action, including the specification of any tests or reports upon which such action is proposed;
   (c) describe any alternative educational opportunities available on a permanent or temporary basis;
   (d) inform the parent or guardian of the right to object to the proposed action at a hearing before the Hearing Officer;
   (e) inform the parent or guardian that the child is eligible to receive, at no charge, the services of a federally or locally funded diagnostic center for an independent medical, psychological and educational evaluation and shall specify the name, address and telephone number of an appropriate local diagnostic center;
   (f) inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child's school records before the hearing, including any tests or reports upon which the proposed action may be based, to present evidence, including expert medical, psychological and educational testimony; and, to confront and cross-examine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action was based.

(3) The hearing shall be at a time and place reasonably convenient to such parent or guardian.

(4) The hearing shall be scheduled not sooner than twenty (20) days waivable by parent or child, nor later than forty-five (45) days after receipt of a request from the parent or guardian.

(5) The hearing shall be a closed hearing unless the parent or guardian requests an open hearing.

(6) The child shall have the right to a representative of his own choosing, including legal counsel. If a child is unable, through financial inability, to retain counsel, defendants shall advise child's parents or guardians of available voluntary legal assistance including the Neighborhood Legal Services Organization, the Legal Aid Society, the Young Lawyers Section of the D.C. Bar Association, or some other organization

(7) The decision of the Hearing Officer shall be based solely upon the evidence presented at the hearing.

(8) Defendants [the school] shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.

(9) A tape recording or other record of the hearing shall be made and transcribed and, upon request, made available to the parent or guardian or his representative.

(10) At a reasonable time prior to the hearing, the parent or guardian, or his counsel, shall be given access to all public school system and other public office records pertaining to the child, including any tests or reports upon which the proposed action may be based.

(11) The independent Hearing Officer shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System.

(12) The parent or guardian, or his representative, shall have the right to have the attendance of any official, employee or agent of the public school system or any public employee who may have evidence upon which the proposed action may be based and to confront, and to cross-examine any witness testifying for the public school system.

(13) The parent or guardian, or his representative, shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(14) Within thirty (30) days after the hearing, the Hearing Officer shall render a decision in writing. Such decision shall include findings of fact and conclusions of law and shall be filed with the Board of Education and the Department of Human Resources and sent by registered mail to the parent or guardian and his counsel.

(15) Pending a determination by the Hearing Officer, defendants shall take no action described in Paragraphs 13.b or 13.c, above, if the child's parent or guardian objects to such action. Such objection must be in writing and postmarked within five (5) days of the date of receipt of notification herein above described 348 F. Supp. at 880-82.

of these drugs, some uses of stimulant drugs on some children under a physician's supervision appear justified.[15] But very few "troublesome" children are truly hyperkinetic, and stimulant drugs are being used on children who are mislabeled as hyperkinetic,[16] or are tagged with catchall labels like "minimal brain dysfunction" (or "functional behavior disorder") which include a wide variety of "symptoms," many of which are common to almost all grade school children.[17] This raises the classic question of whether it is the child's behavior or the school's learning environment which should be altered.[18] It also raises the larger public policy questions about behavior-control.[19] A substantive attack against this practice may well be merited; at the very least, lawyers should insist upon strict procedural safeguards to insure an accurate medical classification and professional administration of the medication.[20]

A second group of misclassified children are those who are transferred out of a regular class into a special class for "educable mentally retarded children" as a result of tests which are culturally or linguistically biased and do not attempt to measure adaptive behavior.[21] This is the form of misclassification challenged in *Stewart* v. *Phillips*,[22] *Diana* v. *California State Board of Education*,[23] and *Larry P.* v. *Riles*.[24] A few paragraphs from the complaint in *Diana* illustrate the problem:

> The state of California authorizes separate classes for mentally retarded children. These classes provide children minimal training in reading, spelling, and math. They also teach children body care and cleanliness, how to slice meat, how to fold a piece of paper diagonally, and how to chew and swallow food....
>
> Placement in one of these classes is tantamount to a life sentence of illiteracy and public dependence. The stigma that attaches from placement causes ridicule from other children and produces a profound sense of inferiority and shame in the child. It is therefore of paramount importance that no child be placed in such a class unless it is clear beyond reasonable doubt that he suffers from an impairment of ability to learn.
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> ***
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> The IQ scores of the nine plaintiffs when tested solely in English by a non-Spanish speaking tester ranged from 30-72 with a mean score of 63 1/2. On November 1 and 2, 1969, each of the nine was individually retested by an accredited California psychologist. Each was given the WISC test (in English and/or Spanish) and each was permitted to respond in either language. Seven of the nine scored higher than the maximum score used by the county as the ceiling for mental retards. These seven ranged from 2 to 19 points above the maximum with an average of 8 1/2 points over the cutoff. . . . The average gain was 15 points.[25]

A third group of children who are misclassified and thus will benefit from procedural safeguards are those who need special education, but who have received an incorrect special education label. One report has concluded, for example, that more than twice as many students in Boston are classified retarded than is in fact the case.[26] The parents of 21 of these children labeled retarded by the Boston School System asked for an independent re-evaluation and found that ".... over half of the children [labeled as retarded] had I.Q.'s in the normal range. Some had evidence of perceptual motor handicaps. Some were emotionally disturbed."[27] Clearly, the purpose of, and only justification for, a special education label is to identify specific needs so that specific educational services can be provided; even a well-designed program for retarded children will probably be detrimental to an emotionally disturbed or perceptually handicapped child. Misclassification in these cases is equivalent to providing the child with no education from which he can benefit (i.e., *de facto* exclusion from education).[28]

A due process hearing provides the parents with an opportunity not only to question the appropriateness of the school's classification of

their child, but also to question the school's classification process as a whole. The potential significance of a challenge to the validity of the classification process is illustrated by *Larry P.* v. *Riles* [343 F. Supp. 1306 (N.D. Cal. 1972)] where black school children argued that the school's procedure of using IQ scores to determine ability had resulted in their misclassification as "mentally retarded." They claimed that the stigmatizing label was applied to them on the basis of IQ test results which penalized unfamiliarity with white middle class background.

The court in *Larry P.* concluded that where the percentage of black children in special education (EMR) classes was more than twice the percentage of blacks enrolled in the school district, the IQ test scores which were primarily responsible for the racial imbalance were "suspect."[29] Therefore under equal protection analysis the burden of proof in justifying the use of those IQ tests shifted to the defendants. Despite the argued educational need for identifying the educable mentally retarded and the alleged non-existence of better alternatives, the court concluded that the defendants had not sustained their burden of proving a rational relationship between scoring on the questioned IQ test and the ability of black students to learn. Absent such a demonstration, denial of equal protection to such students was established, warranting issuance of preliminary injunctive relief as to future testing and future re-evaluations.[30]

Larry P. illustrates how the equal protection clause as well as the due process clause can be used to insure fair and accurate procedures leading up to the classifying or labeling decision. The court utilized the equal protection clause to shift the burden of proving the validity of the classification to the school — exactly where it belongs.

B. Developing Procedural Protection for Transfers Between All Tracks

While *PARC*, *Mills* and *Larry P.* provide important stepping stones, their immediate application is to cases involving transfers from regular to special classes, and therefore they may not by themselves be sufficient to establish an enforceable right to a due process hearing to challenge *any* classification which has important consequences, such as a transfer from a "high" or a "normal" track (ability group)[31] to a low track (ability group). The logic of these and analogous cases, however, should provide a weighty argument for such a conclusion.

Analogous cases establish the principle that a due process hearing is required before denial of any important government benefit or before government action detrimental to an individual, especially when the detriment takes the form of stigmatization. Thus the Supreme Court has required a hearing before prejudgment garnishment [*Sniadach* v. *Family Finance*, 395 U.S. 337 (1969)]; before a citizen's drivers license can be taken from him [*Bell* v. *Burson*, 402 U.S. 535 (1971)]; and before posting the names of excessive drinkers in liquor stores [*Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971)].[32] The interest at stake in denying a child access to a mainstream education is as important as that involved in denying adults access to automobiles or ungarnished wages, especially given recent decisions by courts at all levels stressing the unique and fundamental importance of education.[33]

The *Constantineau* case is of particular significance because it exemplifies the Supreme Court's sensitivity for official action which stigmatizes an individual, even when the interest at stake does not appear to be as weighty as "basic needs" like income, housing, and education.

> Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and opportunity to be heard are essential. Posting under the Wisconsin Act may be to some merely the mark of illness; to others it is a stigma, an official branding of a person. The label is a degrading one.... Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.[34]

If a prior due process hearing is required before stigmatizing an adult regarding access to alcohol, it would certainly appear that similar procedural protections should be afforded a child before being denied access to the normal mainstream class (benefit) and being placed in

a low track with corresponding stigmatization and narrowed job options (detriment).[35] Placing a child in a low track — whether the exact label is "general," "standard," or "basic" — is equivalent to an official branding or stigmatization of that child because teachers and other students, as well as the child himself, all read the label as "dumb."[36] The socio-psychological consequences of this label are so pervasive that placement in a low track may well be the most important thing that happens to a child while in school. Thus both criteria — government action stigmatizing an individual or affecting an important interest, each of which appear sufficient to trigger the right to a prior due process hearing — are met when the school labels a child "dumb" by placing him or her in a low track.

In addition to stressing the analogy between education and other kinds of interests, lawyers should stress the analogy with other educational decisions which have been held so important as to require a prior due process hearing. The denial of a mainstream education by labeling a child "low track" ("dumb") is not qualitatively different from labeling a child "exceptional" or suspending him from school for a substantial period of time. Similar procedural safeguards are warranted.[37]

Indeed, the harm suffered by incorrectly labeling a child as "low track" or "dumb" has such profound educational, occupational, and socio-psychological consequences that it is even more essential than in a simple discipline case to insure that the decision-making process is fair and accurate. A child suspended from school for three to ten days can more easily overcome his temporary "discipline problem" label than can a child who receives the more permanent "dumb" label. A child who is effectively labeled "dumb" will inherit a diluted education and a stigma which will significantly affect all his future dealings with his friends, teachers, family, and prospective employers.[38]

While some judges will not be receptive to argument and evidence of these harmful effects,[39] others will grasp their significance. Judge J. Skelly Wright, analyzing evidence of the harm caused by tracking within the District of Columbia schools, found that

> ... even in concept the track system is undemocratic and discriminatory. Its creator admits it is designed to prepare some children for white-collar, and other children for blue-collar jobs.... [T]he danger of children completing their education wearing the wrong collar is far too great for this democracy to tolerate.[40]

At the very least, children who are transferred from a mainstream to a low track should be allowed a due process hearing to determine if that collar (label) has been fairly applied by the school. Even if a school could show that assignment to a particular low-level class in another ability grouping system did not track children into blue collar or dead-end jobs, the harmful effects of stigmatization warrant a hearing to insure that the assignment reflects actual differences in ability and achievement.[41]

One federal district court has noted that an educational rationale joins the legal one for requiring a due process hearing before any fundamental change in educational status: "The American public school system, which has a basic responsibility for instilling in its students an appreciation of our democratic system, is a peculiarly appropriate place for the use of fundamentally fair procedures."[42]

Elements of a Due Process Hearing

But what should be the nature of the due process hearing required before the school makes any transfer out of the normal mainstream track? The Supreme Court has stated that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action."[43] *Dixon* v. *Alabama State Board of Education*,[44] one of the earliest cases which found a student right to a hearing, prescribed a balancing test to determine exactly what due process requires in each case. The importance both to the student and to society of the student not being suspended (or not being placed in a low track) is weighed against whatever interest the government has in acting quickly and efficiently. The weighty interest of the student has already been underscored. While there may be an interest of the school to act quickly in many discipline cases, there is no correspon-

ding argument for the school to act quickly in the process of labeling. In fact, the obligation should be for the school to act with a high degree of care and accuracy before pinning a label on a student which will eliminate him from the mainstream of his peers and inflict upon him the other harms which are emphasized in this article.

Some idea of what due process requires can be gathered from cases which have developed the *Dixon* concept of fundamental fairness in school disciplinary proceedings.[45] Since the "educational" decisions involved in assigning students to various ability groups are of a more complex and continuing nature than disciplinary decisions,[46] the hearing procedure should account for these differences. Such differences inherent in making special education decisions probably account for the relatively elaborate procedures adopted by Judge Waddy in *Mills* and his model (which among other things provides for periodic review and burden of proof shifted to the school) may be more appropriate for "tracking" cases than the model offered by the school disciplinary cases.

To some extent, the issues to be determined at a hearing called by a child protesting assignment to a low track will vary according to the asserted purpose of tracking,[47] but in most cases the justification will probably be that the lower level class is better suited to the educational needs of the student than the normal mainstream class. In order to challenge this determination, minimally fair procedures would include the following: notice of the reasons for the proposed transfer out of the normal mainstream class and of the right to a hearing before transfer; right to be represented at the hearing by counsel; to have access to all relevant school papers and records; to confront and cross-examine witnesses; to present evidence and witnesses on the child's behalf; to an impartial and informed tribunal; to a record of the proceedings;[48] and to a written decision based on the record and supported by reasons.

The normal mainstream class from which a student should not be removed without a prior due process hearing is properly viewed as one which does not carry a stigma and narrowed job options — in most schools in modern day America this will be the college preparatory class. Everyone should have a right to inclusion in this class, at least until he or she is proven to need something different.

Establishing and enforcing fair procedures for placement within the various tracks is important in that large numbers of children are misclassified, and thus unfairly subjected to harmful consequences even by the school's own standards. The misclassification of normal children into special education classes has already been mentioned. Similar misclassification occurs in labeling children for various tracks or ability groups within the regular

curriculum.[49] While schools often attempt to classify students fairly according to ability and achievement, many able students are pushed into a low track not because of lack of ability but because of behavior problems or personality conflicts with the teacher. An educational rather than a disciplinary justification is presumably necessary for placement in a low track. As is the case with special education classes, low tracks should be consistent with the educational needs of students, not a dumping ground where the school can get rid of its problems and mete out academic punishment for a disciplinary offense.

Procedural safeguards are also important in that they provide the mechanism to focus attention and criticism upon the practice of tracking, and in so doing they may facilitate efforts to eliminate the practice, or at least its most blatant forms, altogether. This result obviously depends upon how politically effective the community can be in exercising its opportunity to be heard on the issue.

But the main advantage of the procedural approach is that it is the most likely winner in and out of court. Regardless of the controversy surrounding the merits of ability grouping, most judges and educators probably agree that the labeling process should be operated fairly and with an opportunity to challenge the validity of any classification that has important consequences. The major problem with this approach is that it does not raise the substantive question of the validity of the practice itself. Even if the classifying process is "fairly" administered, what convincing justification does the school have for a practice which stigmatizes and isolates children, and narrows their occupational options? We believe that most of the benefits claimed to result from the practice are either nonexistent or greatly exaggerated, and, except for those children whose needs are so clearly different as to require special education,[30] certainly do not outweigh the consequent harms. Most forms of ability grouping are not justifiable either as a matter of policy or of law. The next section attempts to develop a framework for a substantive legal challenge.

II. SUBSTANTIVE CHALLENGES

A. Successful Challenges to Tracking Systems Which Have Racial and Economic Effects

A substantive attack on the practice of ability grouping (tracking)[31] is difficult to maintain, and lawyers should consider the legal and educational problems with great care before filing a complaint. In those few cases where the school's power to classify on the basis of ability has been challenged, the court's traditional response is reflected in a case decided in Illinois in 1877: "Under the power to prescribe necessary rules and regulations for the management and government of the school, [the board] may, undoubtedly, require classification of the pupils with respect to proficiency or degree of advancement in the same branches."[32] There is also dicta in recent cases to the same effect. Thus Judge Bell in *Steel* v. *Savannah-Chatham County Board of Education*[33] writes:

> [I]t goes without saying that there is no constitutional prohibition against assignment of individual students to particular schools on a basis of intelligence, achievement or other aptitudes upon a uniformly administered program but race must not be a factor in making the assignments.

The few successful challenges to ability grouping systems have been in cases where the labeling amounted to a *de facto racial* classification. Thus the court in *Moses* v. *Washington Parish School Board*[34] invalidated an ability grouping system in which the testing necessary for ability grouping was applied to black students for the first time in the year the schools were first integrated. The opinion assumes that ability grouping within the school will be valid at some later point in time.

The Fifth Circuit, however, in reiterating the precedent established in *Singleton* v. *Jackson Municipal Separate School District*[35] that recently desegregated schools cannot assign students on the basis of achievement test scores, indicated in *Lemon* v. *Bossier Parish School Board*[36] that the question remains open and justiciable:

> We decline once again, however, the invitation to rule on the validity of testing per se. When a school district that has operated as a unitary system for a sufficient time raises the issue, we will then decide that complex and troubling question which, suffice it to say, is not simplistic.

One federal district court judge has already decided this "complex and troubling question" in *Hobson* v. *Hansen*,[37] by far the most important case in the field. In *Hobson*, Judge J. Skelly Wright found that the District of Columbia's tracking system violated the federal constitution[38] because the labeling of students in that system amounted to *de facto* racial and economic classifications. While this case also dealt with a number of other invalid

educational practices in Washington, D.C., the focus here is on the court's analysis of the defects of the tracking system.

The court's inquiry was triggered by the fact that the tracks correlated with socioeconomic status and race: poor blacks were predominant in the lower tracks while middle class whites were disproportionately represented in the high tracks.[39] The court found that this disparity resulted from ability tests which were culturally biased and hence measured children according to their socioeconomic and racial background rather than their ability.[40]

> When standard aptitude tests are given to low income Negro children or disadvantaged children, however, the tests are less precise and less accurate — so much so that test scores become practically meaningless. Because of the impoverished circumstances that characterize the disadvantaged child, it is virtually impossible to tell whether the test score reflects lack of ability — or simply lack of opportunity.

The court also found that most children were placed in tracks as early as the fourth grade, and that children rarely were able to escape from a low track because the education was not compensatory and re-evaluation was infrequent.[41] This lock-in effect had far reaching consequences since the curriculum in lower tracks was tailored for a "blue collar" education, and children in lower tracks thus had virtually no chance to acquire the skills and background necessary to qualify for college.[42]

Because the tracking system had its basis in culturally biased tests, was operated in a rigid manner, and offered no compensatory education — the net result being that disproportionate numbers of blacks and poor were tracked into an inferior education — Judge Wright held that the tracking system violated the Fifth Amendment's due process clause (the D.C. equivalent of the equal protection clause).[43]

> As to the remedy with respect to the track system, the track system simply must be abolished. In practice, if not in concept, it discriminates against the disadvantaged child, particularly the Negro.... [A]ny system of ability grouping which ... fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar.[44]

Because of the danger of a narrow and weak application of the "rational relationship" test under traditional restrained review,[45] a major task in any litigation attacking an ability grouping system under the equal protection clause is to convince the court that it should apply "strict review" to the classification. With strict review the plaintiff need only make a *prima facie* case of harm, and the burden then shifts to the school to prove that the classification (label) serves some "compelling state interest."[46] To secure strict review, the plaintiff must establish that the classification is *either* "suspect" ("invidious"), *or* infringes upon a "fundamental interest."[47]

Racial classifications are the classic example of "suspect classifications," and the ability grouping system in each case should be carefully scrutinized to determine if one consequence is racial separation. The effort to convince courts that classifications based upon wealth were also suspect suffered major setbacks in *James* v. *Valtierra*[48] and *San Antonio Independent School District* v. *Rodriguez*.[49] Some wealth classifications will be considered suspect, however.[50] A 1971 decision by the Supreme Court indicated that a wealth classification might be suspect when its effect is to track poor people into inferior jobs. Thus the Court in *Townsend* v. *Swank*[51] noted that "... a classification which channels one class of people, poor people, into a particular class of low paying, low status jobs would plainly raise substantial questions under the Equal Protection Clause."

Since there is evidence that ability grouping does track children from low income families into low income, low status jobs, and since J. Skelly Wright has already made such a finding in the *Hobson* case, considerable stress should be placed upon job predetermination ("destiny tracking") as a major harm of ability grouping

systems. However, even in the absence of a factual situation whereby black and poor children are tracked into inferior jobs and otherwise discriminated against, ability grouping still inflicts serious damage upon children. The next section will outline a legal theory[72] which would challenge ability grouping even in racially and economically homogeneous schools.

B. Developing Challenges to All Ability Grouping Systems

While *Hobson* v. *Hansen* takes an important step in the direction of equal educational opportunity by underlining some of the inequities of tracking, the legal analysis provided by the case ignores the underlying harm of the practice. The plaintiffs assume that if an accurate test were devised, compensatory education provided, and rigidity within the system eliminated, then ability grouping would be educationally justified.[73] Even if an ability grouping system somehow managed to avoid all of these shortcomings, however, and blacks and other minorities were proportionately represented in high ability groups, the practice of structuring a school system around ability groups produces enough harmful effects that the practice should be invalidated as a matter of law as well as policy.

Ability grouping inflicts harm because the separation of children limits interaction and creates stigma, both having adverse academic effects on low group students.[74] The prevention of exposure to diversity is one of the most troubling consequences of ability grouping. It seems almost a truism to say with Justices Brennan and Hand that education grows out of "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[75]

We have already noted that students in a low group in one course are usually placed in low groups in other courses, and that low group students in one school year will probably be in low groups the next year. Thus ability grouping seals off possibilities of interaction between groups during crucial classtime hours; often staggered lunch-time scheduling also prevents potential free-time interaction between groups. Heterogeneous grouping for extracurricular activities mitigates somewhat the harm of separation, but the very context of an athletic, musical, or social event obviously limits the extent and nature of this interaction.

Ability grouping is also harmful because its inherent separation gives formal school (state) support to the sense of inferiority among members of the low groups which most students[76] and teachers[77] regard as the "dumb" groups, and, what may be just as harmful, to a sense of superiority among the high "smart" groups. Many teachers of low ability groups will recognize remarks like "This is too hard for us — don't you know we're the dumb group?" The superior feelings of high group students are often revealed by statements like "I wouldn't go out with anyone in a low track." Findley and Bryan's review of the literature lead them to conclude: "The effect of ability grouping on the affective development of children is to reinforce (inflate?) favorable self-concepts of those assigned to high achievement groups, but also to reinforce unfavorable self-concepts in those assigned to low achievement groups."[78]

All students realize that there are fast and slow learners, but it is another matter for these academic differences to become so important in the minds of teachers and administrators that the entire school is structured around them. The message transmitted, even if unconsciously, is that academic (ability) differences are the most important value of the school (state) to which all other values must yield. Academics and competition, rather than equality and cooperation, are the central values and goals, and if you do not measure up by these standards, you do not measure up in the things that are really important.

Some educators will argue that ability grouping merely prepares students for the real world where similar classifications and stigmatization exist, and that heterogeneous grouping just protects the student from "reality" and makes his entry into it a more traumatic experience. This argument involves a fundamental misconception about "reality." To be sure, the social and occupational world makes such distinctions, many of them justifiable. Even if one assumes that the values of the workaday world should also govern within the school building,[79] however, these

differences still do not, or at least should not, smother the underlying equality and dignity of the individual. We may have first, second, and third class jobs in this country, but we do not, or should not, have first, second, and third class citizens. All are equally valued under our constitution and democratic heritage. The butcher's dignity as well as his vote is valued as highly as is the doctor's. To the extent that schools blur rather than clarify this distinction, they do a disservice to students and distort educational and democratic ideals by creating an artificial and harmful sense of inferiority.

Of course it is not contended that ability grouping has stigmatizing effects on *all* students in lower groups. Because human beings are diverse and infinitely complex, they respond differently to similar situations. Some slow students, for example, will feel greater stigma in a heterogeneous group which includes significantly faster students, and may consequently perform better academically and socially where he or she is at the top of a low group. The studies show this kind of effect for *some* students,[80] but also show that *on the whole* ability grouping has adverse academic and social-psychological effects on children in lower groups. Thus Findley and Bryan's review of the numerous studies lead them to the following conclusions:

> Assignment to low achievement groups carries a stigma that is generally more debilitating than relatively poor achievement in heterogeneous groups.[81]

> Ability grouping, as practiced, produces conflicting evidence of usefulness in promoting improved scholastic achievement in superior groups, and almost uniformly unfavorable evidence for promoting scholastic achievement in average or low-achieving groups.[82]

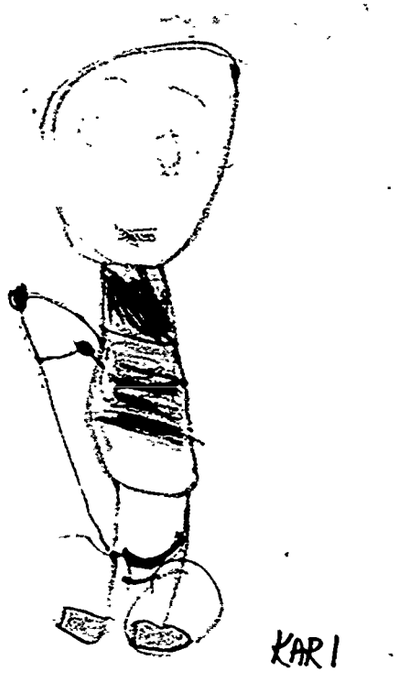
The conclusion that stigma is greater in homogeneous ability groups than in heterogeneous ones is not surprising. In a large school one will not get to know everyone, even with heterogeneous grouping, and certainly not with homogeneous grouping. While students in heterogeneous classes probably will not get to know enough other students on an intimate basis to observe real intellectual differences and make numerous value judgments about who is "smart" and who is "dumb," the school facilitates and makes such labeling inevitable when it structures most of its classes on this basis. Thus teachers as well as other students are tempted to prejudge a person on the basis of his designated ability group rather than getting to know him as an individual (creating a self-fulfilling prophecy commonly called "the Pygmalion Effect").[83]

In sum, ability grouping, although designed to increase academic proficiency for *all* students,[84] has a negligible positive effect on high group students and a significant detrimental effect on low group students. More important, ability grouping produces harm in at least two other ways: the separation inherent in ability grouping (1) severely restricts students' *exposure* to their own diversity, as well as fundamental similarity, and (2) *stigmatizes* whole groups of students as inferior. These adverse effects of ability grouping are color and wealth blind; they damage children without regard to whether they are black or white, rich or poor.

Equal Protection — Strict Review

Ability grouping is more vulnerable if the court applies strict review to the classification. As mentioned above, courts apply strict review if the classification is either suspect or infringes upon a fundamental interest. The Supreme Court in *San Antonio Independent School District* v. *Rodriguez*[85] refused to recognize education as a fundamental interest for most equal protection purposes. Education may be considered a fundamental interest, however, if "the system fails to provide each child with the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[86] With many high schools currently graduating large numbers of non-readers and functional illiterates,[87] this approach is not as improbable as it first might seem. Given "the Pygmalion Effect,"[88] stigmatization, and the reality of low track "dumping grounds," placement in a low track might well be shown to have the effect of significantly reducing a student's chances to acquire basic skills.

Even if this approach fails, a court may still



find the classification to be suspect, although this will be more difficult in the absence of a racial effect. The Court in *Rodriguez* underscored "the traditional indicia of suspectness: the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[89]

One can argue that children generally are a class lacking political power and historically have been considered to need special judicial protection.[90] Certain kinds of children are prime candidates. Handicapped children, for example, are a disabled class victimized by a long history of unequal treatment.[91] So too, children who for various reasons are penalized by placement in low track, dead-end classes arguably form a class meeting the indicia of suspectness articulated by the Court. This is especially true if, as some commentators have stated, stigmatization is also considered by courts to be an indicia of suspectness.[92]

Given strict review, can the school show that any compelling state interest necessitates the classification? Some schools might argue that ability grouping is justified because they allow the students and parents the choice of an Academic, Vocational, or General course of instruction. This choice is often illusory. Students previously in a low ability group will be placed in the college-preparatory Academic track if they insist, but might find themselves in *one of the low-grouped sections of the common course,* with grades diluted accordingly. Thus the school contends that the free choice system has replaced tracking, but tracking continues as before with the school making the assignment to a low section (group). Even assuming the validity of forcing a student at this early age to make a choice with such far-reaching consequences, "free choice" in this area is usually distorted by pressures similar to those that made "free choice" unworkable in the desegregation context.[93]

The most frequent justification for ability grouping is that it increases the academic proficiency of all students since it is geared to the individual needs of the student. This has a nice ring to it since almost everyone will applaud individualized instruction. In practice, however, ability grouping defines the alleged needs of the *group* rather than the needs of the *individual.* In so doing, it facilitates judging, treating, and responding to a person on the basis of his group label rather than on his qualities as an individual. And the assertion that ability grouping increases the academic proficiency of *all* students is contradicted by the systematic studies mentioned above.[94] Thus the academic burden inflicted by the classification falls heavily upon low group students, and there is no corresponding benefit.

This detrimental academic effect is almost an inevitable consequence of a low track label because that label stigmatizes whole groups of students as "dumb" in view of the low group students themselves, other students, and teachers.[95] The crucial role of teacher and student expectation upon academic performance has been dramatized by researchers describing "the Pygmalion Effect."[96] Even if it could be demonstrated that the achievement scores of both low and high groups were raised an average of two or four points as a result of ability grouping, it is doubtful that such gains serve such a compelling state interest as to outweigh the socio-psychological harm of stigmatization.

Equal Protection — Restrained Review

If the lawyer cannot establish a fundamental interest or a suspect classification, he may find some leverage in traditional restrained review which invalidates any classification which is not "rationally related to a permissible purpose." Some courts in effect abdicate judicial responsibility by interpreting this test to invalidate only those classifications for which no conceivable rational purpose is possible, but

> [w]ith the movement away from judicial restraint in areas of race and personal rights has come a corresponding retreat from the notion that any conceivable purpose which would uphold a classification should be attributed to it.[97]

The *Hobson* and *Larry P.* cases discussed above provide some support for effective review under the "rationally related to a permissible purpose" test. While both cases involved *de facto* racial classifications making them appropriate for strict review, the courts used the rational relation test to invalidate the classifications. More important, one commentator has noted that a number of recent decisions by the Burger Court have "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard."[98]

The argument will be made below that public education was not founded to promote narrow academic goals, but rather to promote a broad educational goal which might be summarized as preparing students to function effectively as citizens in our democracy. One argument under restrained review then is that ability grouping constitutes an impermissible purpose because it subordinates this broader educational goal to the narrower one (or that such a subordination is not rationally related to the broader permissible purpose). Any educational device which separates different children from each other on the basis of grades and test scores, preventing interaction and stigmatizing one group as inferior, no matter how much test scores might be increased (and they are not), cannot be reasonably said to be rationally related to this broader and primary goal.

A "Newer" Equal Protection — Moderate Review?

There is no apparent reason why courts should get locked into the "two-tier" approach to equal protection analysis which does not permit degrees of review in the gap between the "strict" and "restrained" extremes. The equal protection clause does not state or imply that effective judicial review of denials of equal protection is appropriate only if there is some very special reason for protection.[99] And surely the equal educational opportunity alluded to in *Brown* v. *Board of Education*[100] means more than usually provided by traditional, restrained review. *San Antonio Independent School District* v. *Rodriguez* reaffirmed this language about the fundamental importance of education, even though declining to consider education generally as a fundamental interest for equal protection purposes.[101]

In practice, if not in theory, many courts have applied various degrees of review based on a "continuum" or "sliding scale" rather than the two-tier approach.[102] And it is becoming clear that some justices on the Supreme Court are dissatisfied with the rigidity of the two-tier approach, and are trying to develop a more flexible form of review under the equal protection clause. Gerald Gunther reviewed fifteen equal protection decisions of the Supreme Court's 1971 Term, and reached the following tentative conclusions:

> (1) The Burger Court is reluctant to expand the scope of the new equal protection, although its best established ingredients retain vitality. (2) There is mounting discontent with the rigid two-tier formulations of the Warren Court's equal protection doctrine. (3) The Court is prepared to use the clause as an interventionist tool without resorting to the strict scrutiny language of the new equal protection.[103]

Justice Powell writing for Chief Justice Burger, Justice Blackmun, and Justice Rehnquist in *Rodriguez* adopts the two-tier analysis, but Justice Stewart's concurring opinion suggests a somewhat different standard, and the dissents, especially that of Justice Marshall, reflect the discontent suggested by Gunther. Perhaps lawyers should follow the lead of the

Court and remain flexible, for, as Gunther observes, these cases do not produce a fully developed, alternative equal protection analysis, but they do signify "a widespread inclination to re-examine old rationales."[104]

State Constitutions and Statutes

By structuring their entire internal system around ability groups which have academic achievement (and job predetermination) as the primary goal, schools frustrate the broader purpose which public education was and is supposed to serve. While most Americans today expect public education to serve many (often inconsistent) purposes, and consensus regarding a primary purpose would be as difficult to obtain as any other decision having a major impact upon the socioeconomic structure of the country, that question was resolved in many state constitutions and statutes which indicate that the primary purpose of public education should be much broader than maximizing academic achievement. This broader educational goal might be summarized as preparation of students to function effectively as citizens in our democracy.

Public education was historically established for purposes which are broader than narrow academic concerns. Crossman and Benda[105] review the writings of Thomas Jefferson, Benjamin Franklin, and other founding fathers and conclude:

> Other witnesses might be summoned, but enough has been said to demonstrate clearly the thesis that the founders were firm in their beliefs that any system of education, particularly at public expense, would have as its fundamental purpose that of making the new form of government work.

The state constitutions which explicitly refer to the purpose of public education incorporate this broader view. Article IX, Section 1 of the Idaho Constitution is typical: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools."

The Massachusetts Constitution elaborates upon this theme:

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of the legislatures and magistrates, in all future periods of this commonwealth, to cherish . . . public schools and grammar schools in the towns . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments, among the people. Chapter V, Section II.

And the Massachusetts legislature did in fact legislate for these broader educational goals. Chapter 71, Section 2 of the Massachusetts General Laws, for example, provides: "In all public elementary and high schools American history and civics . . . shall be taught as required subjects for the purpose of promoting civic service and greater knowledge thereof, and of fitting the pupils, morally and intellectually, for the duties of citizenship."

Almost everywhere one looks to discover the purpose for the establishment of public education — whether to statements by the founding fathers, educators, the courts, state constitutions, or statutes — the predominant theme is that the purpose of public education is to prepare students to function effectively as citizens in a democracy. The concept, while old, is not antiquated. Contemporary educators often paraphrase it in modern terminology.[106]

Perhaps more important, courts at all levels recognize this broader educational purpose. The famous language of the Supreme Court in *Brown* v. *Board of Education* has already been noted.[107] The following are illustrative quotations from federal and state courts:

> One of the most important aims of the school should be to educate the

> individual to live successfully with other people in our democracy.... [S]ociety expects public education to concern itself with building young citizens as well as teaching the "3 R's."[108]
>
> [I]t is clear that the solemn mandate of the Constitution is not discharged by the mere training of the mind; mentality without physical well-being does not make for good citizenship — the good citizen, the man or woman who is of the greatest value to the state, is the one whose every faculty is developed and alert.[109]

This kind of "citizenship building" purpose was at one time subject to a narrow definition which imposed patriotism and other forms of obedience upon pupils in the name of good citizenship,[110] but a newer line of Supreme Court cases illustrates a more sophisticated and enlightened view of the citizenship building purpose — one which emphasizes the *process* of education as being at least as important as its *content*[111] and insists that schools in certain areas must therefore practice what they preach. This has important implications in this context because ability grouping is one of the central features of the *process* of public education in this country.

Ability grouping is not designed to achieve a broad educational goal; its very nature assumes a narrow "academic" goal. Ability grouping separates out children initially according to grades and test scores; it teaches subjects which are geared to those grades and test scores; it re-evaluates children on a periodic basis according to grades and test scores; and in the end it evaluates its success and that of the educational process as a whole largely by grades and test scores. Thus the basic values and implied goal of ability grouping is "academic" in the narrow sense of the word. The tangible manifestation of this *de facto* academic goal is the physical reality of the entire internal organization of the school being structured around the demands of ability grouping.

The argument is simply that governing law — constitutional or statutory — requires the local school board to run its school in a manner which is consistent with the broad educational purpose articulated in the state constitution or statutes, and that ability grouping is invalid because its unquestioned assumption of narrow academic (and job) goals contradicts and frustrates realization of that purpose. The contradiction is arguably strong enough to compel the conclusion that ability grouping is an unreasonable exercise of school board discretion, and constitutes an *ultra vires* practice.[112]

The very process of structuring public education around ability groups isolates entire groups of students from exposure to each other, and transmits an anti-democratic message to the student: these academic or ability differences reflect the most important value of the school (state) to which all other values must yield, and a person is somehow inferior if (s)he does not measure up by academic standards. This is the anti-democratic message and practice through which schools pretend to fulfill their obligation to prepare students to function effectively as citizens in a democracy. It should not continue unchallenged.

Ability grouping raises legal and educational questions which are so complex and controversial that it is difficult in this short space to mention all of them, much less discuss them adequately. Some important issues like framing a remedy have not been discussed at all. This section on substantive challenges is simply a summary of some of the theories spelled out in greater detail in another paper,[113] and lawyers who wish to pursue this approach can obtain this paper from the Center for Law and Education.

FOOTNOTES

[1]For a summary of these studies, see Warren G. Findley and Miriam M. Bryan, *Ability Grouping: 1970, Status, Impact and Alternatives* (Center for Educational Improvement, University of Georgia, Athens, Georgia 30601) (copies available upon request).

[2]*Brunson* v. *Board of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970).

[3]E.g., *Mills* v. *D.C. Board of Education*, 348 F. Supp. 866, 880 (D.D.C. 1972) considers anything over two (2) days to be substantial, *Black Students of No. Fort Meyers* v. *Williams*, 470 F.2d 957 (5th Cir. 1972) (10 days). See generally Pat Lines, "The Case Against Short Suspensions," 12 *Inequality in Education* at 39.

[4]*Id.* See also Butler, *infra* note 45.

[5]348 F. Supp. at 875.

[6]Compare the procedures in the consent agreements in *P.A.R.C.* v. *Pennsylvania*, 343 F.Supp. 1257 (E.D. Pa. 1971), and *Lebanks* v *Spears*, _F.Supp._ (E.D.La. April 24, 1973). The latter, like the Massachusetts Special Education Law of 1972, requires a specific educational program to be worked out for each child, along with procedures to monitor progress.

[7]The elements of a due process hearing will vary according to the issue to be resolved. Thus, in disciplinary cases the issue is usually whether the student is guilty of some offense (and perhaps what punishment is appropriate). For an educational placement, the issue is the accuracy of the educational or medical label and the appropriate educational or treatment program. Where treatment entails behavior-modifying drugs, additional safeguards may be necessitated. See *infra* note 20.

[8]The presumption in *Mills* of regular class placement is consistent with the movement toward integrating handicapped children into regular classes. See, e.g., G. Johnson, "Special Education for the Mentally Handicapped – A Paradox," 29 *Exceptional Children* 62 (1962); M. Alexander. "Let Me Learn with the Other Kids," *Learning* (March, 1972) at 19.

The new Massachusetts Special Education Law establishes this presumption of regular class placement, and gives the parent the right to decide whether the child is to be placed in a special or regular class, unless the school can show to the court that regular placement "would seriously endanger the health or safety of the child or substantially disrupt the program for other students." Chapter 766, Acts of 1972.

[9]See The Russell Sage Foundation's *Guidelines for the Collection, Maintenance and Dissemination of Pupil Records* (230 Park Avenue, New York, New York 10017, $.50 per copy); Henry E. Butler, et. al., *Legal Aspects of Student Records* (NOLPE Monograph No. 5, 825 Western Avenue, Topeka, Kansas 66606). For the broader issues, see Arthur R. Miller, *The Assault on Privacy* (1971, Signet paperback).

[10]The law generally recognizes the need for separate representation when the child's interests conflict with the parent's. See *Uniform Juvenile Court Act* (National Conference of Commissioners on State Laws, 1968) (Approved by American Bar Association, 1968) Sec. 26(a); *Standard Juvenile Court Act* (6th ed. 1969), Secs. 37 & 39. See also *In re Henderson*, 199 N.W.2d 111 (1972); *Frazier* v. *Levi*, 440 S.W.2d 393 (Tex. Civ. App. 1969); *Heryford* v. *Parker*, 396 F.2d 393, 396 (10th Cir. 1968).

[11]Many handicapped children once thought to be incapable of benefitting from the regular classroom are now being successfully integrated with normal children. See *supra* note 8.

[12]"62% of the children in [Boston's] classes for the retarded are boys, though the incidence for retardation between the sexes is about equal – fifty-fifty.... [One school official] acknowledged that one criterion for placing a child in a class is whether he 'acts up.' The implication is that a child is removed from the regular class not merely on the basis of his own needs, but as a convenience to the teacher or principal." *The Way We Go to School: The Exclusion of Children in Boston*, A Report by the Task Force on Children Out of School (Beacon Press, paperback) at 40.

[13]"This procedure is needed, the psychologist says, if the child is to stay in the regular program. In some urban areas, however, the parent is told bluntly that unless the child receives treatment (i.e., medication), he will face suspension or be transferred to a special program for the emotionally disturbed.... The school often refers the child to a doctor who specializes in learning disabilities and routinely uses drugs in his treatment." D. Divoky, "Toward a Nation of Sedated Children," *Learning* (March 1973) at 8, 10 (530 University Avenue, Palo Alto, Calif. 94301). See generally the special report on behavior-modifying drugs in 8 *Inequality in Education* at 1-24.

[14]See, e.g., C.K. Connors, et. al., "Dextroamphetamine Sulfate in Children with Learning Disorders," 21 *Archives of General Psychiatry* 182-190 (1969); C.K. Connors, "Psychological Effects of Stimulant Drugs in Children with Minimal Brain Dysfunction," 49 *Pediatrics* 702-708 (1972); L. Eisenberg, "The Clinical Use of Stimulant Drugs in Children," 49 *Pediatrics* 709-15 (1972). A bibliography of such articles can be obtained from the Center for Law and Education.

[15]Compare the following:

"The fact that these dysfunctions [hyperkinetic behavioral disturbance] range from mild to severe and have ill-understood causes and outcomes should *not* obscure the necessity for skilled and special interventions. The majority of the better known diseases – from cancer and diabetes to hypertension – similarly have unknown or multiple causes and consequence.... Yet useful treatment programs have been developed to alleviate these conditions." Report on "Conference on Stimulant Drugs for Disturbed School Children," 8 *Inequality in Education* 14, 15.

"The Medical Letter on Drugs and Therapeutics," a conservative, non-profit publication aimed at clinicians, describes the data on the use of amphetamine-type drugs on children as "meager" and goes on to charge that "there are no adequately controlled long-term studies of the use of stimulants on noninstitutionalized hyperactive children with IQs in the normal range who have only mild neurological abnormalities. Yet it is in such children that the diagnosis of 'minimal brain dysfunction' is most often made and for whom amphetamines may be prescribed...." Divoky, *supra* note 13, at 10.

[16]"So common and so misleading are these symptoms that some doctors estimate that less than half of the children labeled hyperactive by teachers and sent for special treatment are in fact hyperactive." Divoky, *supra* note 13, at 8.

The "Conference on Stimulant Drugs," *supra* note 15 at 15, states that there is no single diagnostic test and the

diagnosis should be made by a specialist. "In diagnosing hyperkinetic behavioral disturbance, it is important to note that similar behavioral symptoms may be due to other illnesses or to relatively simple causes. Essentially healthy children may have difficulty maintaining attention and motor control because of a period of stress in school or at home. It is important to recognize the child whose inattention and restlessness may be caused by hunger, poor teaching, overcrowded classrooms, or lack of understanding by teachers or parents. Frustrated adults reacting to a child who does not meet their standards can exaggerate the significance of occasional inattention or restlessness. Above all, the normal ebullience of childhood should not be confused with the very special problems of the child with hyperkinetic behavioral disorders."

[17]"The most commonly used of the 38 terms applied to a grab-bag set of symptoms found in grade school children is minimal brain dysfunction (MBD)....Hyperkinesis, the other most popular and misused label, is often used synonymously with MBD, or is described as the result of MBD." "And a new one, particularly favored by drug makers because it will cover anything: functional behavior disorder." Divoky, *supra* note 13, at 7.

"The condition commonly called minimal brain dysfunction — MBD — is not easy to diagnose: Specialists spend from six hours to three days on the diagnosis." 8 *Inequality in Education* at 8.

[18] "As Dr. Henry L. Lennard, associate professor of medical sociology in the department of psychiatry at the School of Medicine, University of California, San Francisco . warns: 'Once we define behavior as a medical problem, anything can become a deviance, an illness, a disease.' The entire burden of responsibility then shifts subtly from the school — whatever its shortcomings or failures — to the child's inner workings. Nobody has to feel guilty. After all, the child has a medical problem, and that really isn't anyone's fault, is it? Putting the doctor on the case is far easier than restructuring a school environment." Divoky, *supra* note 13, at 7.

[19]In the 1971 science-fiction movie "THX 1138," loudspeakers warn citizens: "If you feel you are not properly sedated, call 060-6060. Failure to do so will result in prosecution for criminal drug evasion." Behavior-control is no longer fantasy given recent medical and technological developments. See, e.g., Perry London, *Behavior Control* (1971, Perennial paperback) at 135-191; Thomas Szasa, *Ideology and Insanity* (1970, Anchor paperback); Tom Parmenter, "Hyperactivity: A Political Malady?" 8 *Inequality in Education* 10; and the recent controversy regarding the proposed psychosurgery to treat a Michigan mental patient, *New York Times*, March 12 and April 2, 1973.

[20]The use of behavior-modifying drugs raises constitutional questions since "autonomy over one's own body, without intrusion of drugs which modify behavior — *no matter how beneficial* — is a matter of ultimate personal concern." For more on possible substantive challenges and procedural safeguards, see Roderick Ireland and Paul Dimond, "Drugs and Hyperactivity: Process is Due," 8 *Inequality in Education* 19.

In this troubling area where the medical evidence and educational issues are so complex, and where parents are subject to unusual pressure to submit to medication, it is especially important that procedural safeguards are developed to insure that parental consent to medication for the child is informed and without duress. Also, it should be obvious from *supra* notes 13-19 that only qualified doctors (preferably not school employees or referees) should label children as in need of behavior-modifying drugs.

[21]"Many persons working with the retarded have long been aware that it is inappropriate to define intelligence solely in terms of IQ. They recommend identification of mental retardation on the basis of adaptive behavior as well as general intellectual functioning. Adaptive behavior, according to Heber (1961), is related to three variables: maturation, learning, and social adjustment. Utilizing these additional criteria to assess intellectual potential makes it necessary to obtain a broad scope of data in order to arrive at more realistic educational expectations of a child." Frederick J. Weintraub, et. al., *State Law and Education of Handicapped Children: Issues and Recommendations* (The Council for Exceptional Children, 1411 South Jefferson Davis Highway, Arlington, Virginia 22202) at 29.

See R.F. Heber, *A Manual on Terminology and Classification in Mental Retardation*, Monograph Supplement to the American Journal on Mental Deficiency, 2d ed., September, 1961; President's Committee on Mental Retardation, *The Six Hour Retarded Child* (U.S. Government Printing Office, 1970); Jane R. Mercer, "Pluralistic Diagnosis in the Evaluation of Black and Chicano Children: A Procedure for Taking Sociocultural Variables into Account in Clinical Assessment," paper presented at American Psychological Association, Washington, D.C., Sept. 3-7, 1971.

For a discussion and bibliography of the literature on bias in IQ testing, see Findley, *supra* note 1, at 59-83.

[22]C.A. No. 70-1199-F (D. Mass.). The Court recently denied a motion to dismiss for mootness because of the new Massachusetts Special Education Law and other developments, and the case is expected to go to trial sometime during the summer of 1973.

[23]C.A. No. C-70-37 RFP (N.D. Cal. 1970) (consent agreement). See also the stipulation and order in *Guadalupe Organization, Inc. v. Tempe Elementary School District*, Civ. No. 71-435 PHX (D. Ariz. 1972) (Clearinghouse #6312D) [National Clearinghouse for Legal Services, 710 North Lake Shore Drive, Chicago, Illinois 60611].

[24]343 F. Supp. 1306 (N.D. Cal. 1972).

[25]Complaint for Injunction and Declaratory Relief. Available from the Center for Law and Education.

[26]Study by Dr. Irving Hurwitz, Associate Chief of Clinical Psychology, Judge Baker Guidance Center, and by his colleagues from the Douglas Thom Clinic and the Boston University Division of Psychiatry Summarized in *The Way We Go to School*, *supra* note 12, at 38.

[27]*Id.*

[28]Procedural safeguards have been developed mainly in the context of exclusion from school, and the legal argument is especially compelling if there is exclusion in fact. *Cf.* Judge Skelly Wright's statement about *de facto* exclusion at *infra* note 64. But compare *Lau* v. *Nichols*, 472 F.2d 909 (9th Cir. 1973) where the Court, despite a vigorous dissent, held that the kind of educational exclusion suffered by Chinese students in English-speaking classrooms did not constitute a denial of equal protection (cert. granted).

[29]The court offers three separate bases for shifting the burden of proof to the school (all tied to racial discrimination), but then demands only that the school offer a rational relationship between the test and the ability to learn rather than a compelling reason to continue with the test. Compare the similar, concurrent application of the standards for strict and restrained review by Judge Skelly Wright in *Hobson* v. *Hansen*, 269 F. Supp. 401, 511 (D.D.C. 1967). See also text corresponding to *infra* note 98

[30]Compare *Copeland* v. *School Board of the City of Portsmouth, Va.*, 464 F.2d 932, 934 (4th Cir. 1972) (en banc) where the court held that the mere fact that 75% of the students tested and assigned to special education classes were black does not violate the equal protection clause, but "it is essential that the record establish that the tests and examinations used are relevant, reliable, and free of discrimination."

[31]A distinction is often made between "tracking" and "ability grouping" – tracking being used to characterize the practice of locking students into a rigid course of study which has the effect of determining future occupation (often called "destiny tracking"). "Ability grouping" is a more general concept which, *ideally*, is the separation of students by ability in each subject (so that a student might be in a low group for mathematics and a high group for history), and permits easy movement between all groups on the basis of frequent measurements of progress. Ability grouping could conceivably operate in such a way that there would be no stigmatizing or anti-exposure effects, but this is extremely unlikely and in practice the opposite is true. In practice there tends to be no difference between "ability grouping" and "tracking" because students are usually placed at the same low or high level in all subjects and the placement tends to have a lock-in effect which makes cross-grouping (sometimes called "cross-tracking") rare. This paper uses the term "ability grouping" to describe, not the ideal, but the reality of the practice as it presently operates in public schools.

The Research Division of the National Education Association (NEA) in 1962 reported that during the school year 1958-59, 77.6% of 3,418 school districts 2,500 and over in population were making some use of ability grouping in the elementary grades, and that 90.5% of these districts were using it at the secondary school level. NEA Research Division, *Ability Grouping* (Research Memo 1962-29, Washington, D.C., 1962).

[32]The Supreme Court has also required hearings before eviction from public housing, *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969); before deprivation of parenthood, *Armstrong* v. *Mauzo*, 380 U.S. 545 (1965); before deprivation of the right to take a bar examination, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); before dismissal from government employment, *Slochover* v. *Board of Higher Education*, 350 U.S. 551 (1956), and before public assistance benefits can be taken from a beneficiary, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[33]See *Hosier* v. *Evans*, 314 F. Supp. 316 (D. St. Croix 1970); *Wolf* v. *Legislature of the State of Utah*, Civ. No. 182646 (Third Dist. Ct. Salt Lake City, Utah, January 1969); *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967); and *Serrano* v. *Priest*, 5 Cal.3d 584, 487 P.2d 1241 (1971).

While denying that education is a fundamental interest for most equal protection purposes, the Supreme Court in *San Antonio Independent School District* v. *Rodriguez*, 93 S.Ct. 1278, 1295 (1973), explicitly reaffirmed the famous language from *Brown* v. *Board of Education:* "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. 483, 493 (1954).

[34]400 U.S. at 438.

[35]For a summary of the harm of tracking, see Findley, *supra* note 1, and *infra* notes 74-84 and corresponding text.

[36]See *infra* notes 76, 77, 83 and corresponding text.

[37]But see *supra* note 7.

[38]For a more detailed description of this harm, see *infra* notes 74-83 and corresponding text.

[39]See *infra* notes 52-56 and corresponding text See also *Simpkins* v. *Consolidated School District of Aiken County*, C.A. No. 71-784 (D.S.C., August 1971), where plaintiffs have been denied a temporary injunction to prevent ability grouping even though there is a racial effect. Judge Simmons concluded that the system of grouping "is an educational rather than a legal matter, at least until a full blown trial on the merits can be had...."

[40]269 F. Supp. 401 (D.D.C. 1967).

[41]The legal basis for a substantive attack against tracking, even if the labels could be shown to reflect actual ability differences, begins at Part II of the text.

[42]*Lucia* v. *Duggan*, 303 F. Supp. 112 (D. Mass. 1969).

[43]*Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961), cited in *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970).

Another way to phrase the test is that what constitutes due process depends largely upon the gravity of the

punishment to be imposed. See *Pervis* v. *LaMarque Independent School District*, 466 F.2d 1054 (5th Cir. 1972)

"294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U S. 930 (1961).

"See *supra* note 3; *Esteban* v. *Central Mo. State College*, 277 F. Supp. 649 (W.D.Mo 1967), aff'd, 415 F.2d 1077 (8th Cir 1969), *cert. denied*, 398 U.S. 965 (1970); and Robert A. Butler, "The Public High School Student's Constitutional Right to a Hearing," *Clearinghouse Review* (December 1971).

"See *supra* notes 7 and 31.

"The express purpose of, or justification for, ability grouping may vary from system to system and class to class. For example, a school might argue that ability grouping is to serve teachers' or students' needs and demands. See *infra* note 79 and text corresponding to *infra* note 93.

"A record of the hearing can be inexpensively made by a tape recording. If the school refuses to make a record, lawyers should insist on the right to make their own tape recording. See *Esteban*, *supra* note 45, where the court held that either side may, at its own expense, make a record of the events at the hearing.

"Many high-ability or high-achievement students are placed in low group courses. This is partly explained by the fact that the characteristics of students as learners are not adequately represented by their scores on general intelligence tests. Thus children grouped by "intelligence" or reading scores will overlap considerably in mathematics achievement. See Findley, *supra* note 1, at 2. A given student's rate of learning may vary not only from one curricular area to another but also from task to task within each area. See the summary of the Heather study in Findley, *supra* note 1, at 25.

"Since many children clearly need special education, no substantive attack on this kind of ability grouping is included in the next section, except to the extent that the lowest of the four tracks invalidated in *Hobson* v. *Hansen*, *infra* note 57, included children labeled "retarded" without justification. An argument might be formulated that a handicapped child has a right to be in a regular class if his presence does not substantially disrupt the educational process. *Cf. supra* note 8.

A different kind of substantive attack may be necessary to insure that the handicapped child is not thrown into a "dumping ground" where little or no education takes place. Paul Dimond, in a forthcoming article titled "The Constitutional Right to Education: The Quiet Revolution," considers a substantive approach, but recommends effective utilization of the procedural mechanism to insure an adequate education. Where procedures fail to insure this goal, lawyers might went to consider the kind of approach taken by the recent "right to treatment" cases. *Rouse* v. *Cameron*, 373 F.2d 451 (D. C. Cir. 1966); *Wyatt* v. *Stickney*, 325 F.Supp. 781, 334 F.Supp. 1341 (M.D.Ala 1971); *Martarella* v. *Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972). But see *Burnham* v. *Georgia*, _ F.Supp. _ (N.D.Geo., Aug. 4, 1972) (no *federal* constitutional right to treatment). Lawyers interested in pursuing a substantive approach can obtain the author's first draft of an article titled "Does the Handicapped Child Have a Right to a Minimally Adequate Education?" from the Center for Law and Education.

"See *supra* note 31.

"*Trustees of Schools* v. *People ex. rel. Van Allen*, 87 Ill. 303, 29 Am. Rep. 55 (1877). The basis for this holding is that a parent cannot demand that the interests of other children be sacrificed for the interests of his child. Recent studies, *supra* note 1, seriously undermine the assumption that average or high ability students are hurt by heterogeneous grouping.

Compare *Berkelman* v. *San Francisco Unified School District*, No.C. 71 1875 LHB (N.D.Cal., Dec. 19, 1972), where the federal district court dismissed a complaint challenging maintenance of an elite academic high school. The court held that even if the various allegations were true, the challenged actions were within the discretion of the school district. (Clearinghouse #6583D, Memo Opinion and Order).

"333 F.2d 55, 61 (5th Cir. 1964). See also *Borders* v. *Rippy*, 247 F.2d 268, 271 (5th Cir. 1957); *Swann* v. *Charlotte Mecklenburg Board of Education*, 300 F. Supp. 1358 (W.D.N.C., 1969).

"330 F. Supp. 1340 (E.D.La. 1971).

"419 F.2d 1211 (5th Cir. 1969), reversed in part on other grounds, 396 U.S. 290.

"444 F.2d 1400, 1401 (5th Cir. 1971).

"269 F. Supp. 401 (D.D.C. 1967) *aff'd sub nom Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

"The court concluded that "the doctrine of equal educational opportunity — the equal protection clause in its application to public school education — is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment." F Supp. at 493.

"269 F. Supp. at 451.

"*Id.* at 485. Compare *Armstead* v. *Starkville Municipal Separate School District*, 461 F.2d 276 (5th Cir. 1972) (test given teachers not substantially related to the knowledge and skills required of teachers, and therefore violation of equal protection clause regardless of whether it creates a racial classification); *Griggs* v. *Duke Power Company*, 420 F.2d 1225, 1233 (4th Cir. 1970) (employer's exam not related to work); *Castro* v. *Beecher*, 459 F.2d 725 (1st. Cir. 1972) (police exam).

"*Id.* at 468-70, 476.

"*Id.* at 445.

"See *supra* note 58.

"269 F. Supp. at 515.

"Heterogeneous grouping would have been the inevitable — though unintended — result if the circuit court of appeals had not worked the miracle of affirming Wright's district court order and at the same time cutting the substance out of his tracking decree. While upholding

his rulings on Washington's tracking scheme, it limited their applicability to the system as it operated up to 1968.... Washington Schools continue to track as usual, but with different lines on the chart and different labels on all the little boxes." Em Hall, "On the Road to Educational Failure: A Lawyer's G'' .e to Tracking," 5 *Inequality in Education* 1, 4 (June 1970).

"See Note, "Developments in the Law — Equal Protection," 82 Harv. L. Rev. 1065, 1080 (1969).

"*Id.* See also *Dunham* v. *Pulsifer*, 312 F. Supp. 411, 417 (D. Vt. 1970).

"As Justice Harlan stated: ". . . an invidious classification offends equal protection regardless of the seriousness of the consequences." *Griffin* v. *Illinois*, 351 U.S. 12, 35 (1955). See generally *Developments in the Law*, *supra* note 65.

"402 U.S 137 (1971).

"93 S. Ct. 1278 (1973).

"*Id.* at 4413.

"92 S.Ct. 502, 508, n.8 (1971).

"The legal analysis in this article is only suggestive, and other approaches should be considered. Compare the legal analysis set forth in David Kirp's "Schools as Sorters: Classification Practices and Contitutional Principles" (forthcoming, University of Pennsylvania Law Review).

"See 269 F. Supp. at 512.

"See text corresponding to *infra* notes 80-83.

"*Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

"See especially the Luchin & Luchin, Mann, and Barker-Lunn studies summarized in Findley, *supra* note 1. Even elementary pupils see through euphemistic labels, and know which ones mean "dumb." See Ray Rist, "Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education," 40 Harv. Ed. Rev. (August 1970).

"The Research Division of the National Educati' Association (NEA) in 1968 found that only 3.1% of teachers listed a low ability group as the ability group they preferred to teach. *Ability Grouping: Teacher Opinion Poll*, 57 N.E.A. Journal 53 (1968). As a general practice, teachers are "promoted" from low to high ability groups, thereby providing the most experienced teachers for those presumably the easiest to teach. Some teacher unions have even tried to get provisions in their contracts guaranteeing promotion out of low groups according to seniority.

See also "The Pygmalion Effect" at *infra* note 83.

"Findley, *supra* note 1, at 3.

"E.g., John Coons, et. al., in *Private Wealth and Public Education* (1970) at 3, state that the primary purpose of public education is to provide "training for basic competence in the market."

"See studies summarized by Findley, *supra* note 1.

"Findley, *supra* note 1, at 3.

"*Id.*

"The ability grouping system almost inevitably prejudices a teacher toward the ability of students within a given group, and this can have devastating consequences for students in low groups. One of the most dramatic illustrations of this point can be found in Robert Rosenthal and Lenore Jacobsen, *Pygmalion in the Classroom* (1968). Teachers were informed that tests indicated that certain pupils would do well and others poorly; this in fact proved to be the case even though the pupils had been chosen at random. For some of the literature stimulated by the Rosenthal and Jacobsen study, see *Finist*, *supra*, note 76, and Janet Elashoff and Richard Snow, *Pygmalion Reconsidered* (C.A. Jones paperback).

Prejudice (pre-judging) also occurs in heterogeneous classes as a result of past records, IQ scores, etc., but the pre-judging is likely to be less aggravated and more amenable to change in heterogeneous classes where children do not carry labels by the very fact that they are in that particular classroom.

"The most common justification for ability grouping is that it enables teachers to tailor their teaching materials and methods to meet the academic needs of all students. Heterogeneous classes, it is claimed, force teachers to aim at the middle level students and neglect the extremes since the curriculum is too slow for fast learners and too fast for slow learners. See Findley, *supra* note 1, at 5.

"93 S. Ct. 1278 (1973).

"*Id.* at 1299.

"The National Reading Center reports that 30 to 60% of students entering junior colleges need reading help, and more than 20% of Americans 16 or older cannot understand at least 10% of standard application questions (for a driver's license or a personal bank loan) (UPI story by Marguerite Davis, Boston Sunday Globe, January 7, 1973). See *Peter Doe* v. *San Francisco Unified School District*, Civ. No. 653 312 (Cal. Super. Ct., filed Nov. 20, 1972), a damage action brought by an 18 year-old high school graduate who can neither read nor write above the fifth grade level despite the award of a high school diploma by the school district (Clearinghouse #9460A, Complaint).

"See *supra* note 83.

"93 S.Ct. 1278, 1294 (1973).

"See, e.g., the discussion of the special status of children in Coons, *supra* note 79 at 419-426, and *Serrano* v. *Priest*, 5 Cal.3d 584, 487 P.2d 1241, 1265 (1971). Children may be one of the powerless "discrete and insular minorities" entitled to special judicial protection. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938). Many cases state or imply a special judicial solicitude for children. See, e.g., *Prince* v. *Massachusetts*,

321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens"); *Ginsberg* v. *New York*, 390 U.S. 629 (1968). But compare the apparent disregard for the children involved in *Wisconsin* v. *Yoder*, 92 S. Ct. 1526, 1541 (1972).

See generally the discussion of "suspect classifications" in *Developments in the Law, supra* note 65, at 1124-26.

"The Greeks of Sparta left their crippled to die on mountainsides. The United States has continued this long history of discrimination against handicapped children. Thus even in 1971 Fred Weintraub, et. al., can dedicate a book to seven million handicapped children: "Sixty percent of these children are denied entry to our public schools. Hundreds of thousands are committed to institutions and other programs where little more than physical sustenance is provided at costs far in excess of what education and rehabilitation would cost." Weintraub, *supra* note 21, at 1.

The primitive state of the law in relation to handicapped children is dramatized by the fact that *PARC* and *Mills, supra* note 6 and corresponding text, and numerous pending suits are necessary in the 1970s simply to prevent continued exclusion from education because of handicap. This alone would justify the conclusion of L. Dolinar: "Handicapped children have long been one of this society's least visible and most neglected minorities." *Learning* (March 1973) at 15.

"See, e.g., F. Michelman, "On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7, 20 (1969); *Developments in the Law, supra* note 65, at 1127. Compare the Court's sensitivity for stigmatizing state action in the procedural context in the *Constantineau* case, *supra* note 34 and corresponding text.

"See, e.g., *Green* v. *County School Board of New Kent Co.*, 391 U.S. 440, n.5 (1968).

"See Findley, *supra* note 1, for a summary of these studies.

"See *supra* notes 76, 77, and 83.

"See *supra* note 83.

"*Developments in the Law, supra* note 65, at 1080.

"Gerald Gunther, "The Supreme Court 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1, 18-19 (1972).

"'No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV (1863). This is not to suggest, however, that all state classifications are invalid.

"'"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. 483, 493 (1954).

"'93 S.Ct. 1278, 1295 (1973).

"'See *Developments in the Law, supra* note 62, at 1120.

"'Gunther, *supra* note 98, at 12.

"'*Id.* at 18.

"'Crossman, George R. and Harold W. Benda, *Public Education in America* (3rd ed. 1966) at 6.

"'See, e.g., Kenneth Clark, "Alternative Public School Systems," Harv. Ed. Rev. (Winter 1968) at 184.

"'See *supra* note 33. See also *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943).

"'*Ferrell* v. *Dallas Independent School*, 261 F. Supp. 545 (N.D. Tex. 1966).

"'*McNair* v. *School District No. 1, 288 P. 188, 190* (Mont. 1930). See also *Alexander* v. *Phillips*, 254 P. 1056 (Ariz. 1927); *McGrath* v. *Burkhard*, 280 P.2d 864 (Cal. 1955).

"'See, e.g., *Ferrell, supra* note 92; and *People ex. rel. Fish* v. *Sandstrom*, 279 N.Y. 523, 18 N.E. 2d 840 (1939).

"'See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969).

Richard Berkman, "Students in Court," 40 Harv. Ed. Rev. 567 (November 1970) marks the change: "While the *Tinker* opinion accepts the conventional view of education as a tool for citizenship-building, the type of citizen desired and the educational means of attaining this ideal differ from the orthodox conceptions.... [T]he majority recognize that the process of education can be more important than its content in achieving educational aims."

"'School Boards do not have unlimited power. Like any municipal corporation, the Board has only as much authority as it has received from the legislature by statute. An action which is not specifically authorized by statute, and cannot be fairly implied from specific statutory authority, is *ultra vires*. See, e.g., *Board of Directors of the Independent School District of Waterloo, Ia.* v. *Green*, 259 Ia. 126, 147 N.W.2d 854 (1967); *Coggins* v. *Board of Education of City of Durham*, 233 N.C. 763, 28 S.E.2d 527 (1944).

The *ultra vires* doctrine should not be confused with federal or state constitutional limitations on school authorities. A school rule which is permissible under the Constitution may still be invalid because the legislature has not delegated the power to school officials to pass the rule. Of course, if the legislature authorizes an act, it must comply with constitutional standards.

"'Merle McClung, *Ability Grouping: The Practice of Maximizing Stigma and Minimizing Exposure in Public Schools*, written for Professor Frank Michelman, Harvard Law School, and Paul Dimond, Center for Law and Education.

How Ability Grouping Fails

by Warren Findley

When most people think of using tests to group school children for instruction, they naturally think of classifying children of the same grade into different classroom groups, often a high, a middle and a low group. The expectation is that the children will learn more if taught with others of similar general ability. This is the most common form of the "ability grouping" practiced widely throughout the nation, especially in large cities. There are many variations on this pattern, particularly the use of teacher judgment to supplement test scores, but the basic rationale is the same. Similarity in measured general ability has been presumed to make teaching "homogeneous" groups more efficient and beneficial.

It is not possible to define "homogeneous" groups, however, on the basis of a single test which measures general readiness for a graded curriculum. Children's abilities vary greatly in different subjects. On a well-standardized test only about half the children in a particular grade will score in the same three levels of grouping in both reading and arithmetic. In a school with 100 children per grade it is common to find a small number of children in the same grade who stand in the top third in reading and the bottom third in arithmetic, and vice-versa. "Homogeneous" grouping might work if children were "homogenized" — but they are not.

Racial Minorities

Several of the unsound aspects of the ability grouping rationale pointed out here should not overshadow a more general understanding of how ability grouping affects minority groups in particular. Although the problem is only partly ethnic and affects all children, it becomes intensified when ethnic minorities are involved.

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For instance, some tests make it appear that black children are more intellectually alike than other children. Because a child may obtain scores at the lower limits of the test norms, it does not mean that he is equally low in all subjects. Fifteen years ago, when I was associated with the Atlanta Public Schools, city-wide achievement testing took place at the beginning of grades 3 through 7. Tests administered in the fall were intended to provide useful information to teachers about their new classes. But in segregated black schools and lower socioeconomic white schools, many children's achievement fell at the lower limits of the norms for their grades. Then schools were encouraged to test pupils at their reading grade levels instead of their grade placement levels. With this shift, children could show the real difference in mastery of different subjects rather than simply proving they did not read at their grade placement levels.

Why Ability Grouping?

Experience and analytical studies have shown that ability grouping fails to make good on its promise to produce better learning. Groupings were tried extensively in the 1920's and 1930's, shortly after World War I. Army Alpha, a group test of mental ability, had proved so useful in a quick preliminary classification of recruits that there was talk of building a whole "science of education" on similar methods of classification through testing. These efforts at ability grouping did not produce results, however, and were largely discarded until the late 1950's when the increasing number of children in school from widely different home backgrounds brought about its revival. The past failures were forgotten when the new tendency to really try to teach "all the children of all the people" brought a new awareness of individual differences.

Like the earlier ones, recent evaluations of ability grouping have largely been ad hoc studies to provide local checks on the effec-

tiveness of local programs. The most systematic study is that of Borg (1966) who compared adjacent school systems in Utah, one using ability grouping and the other random grouping. Following the progress of the children over a four year period, starting with students in grades 4 through 9 until they completed grades 7 through 12, Borg made 144 separate comparisons between ability-grouped and randomly-grouped children. Of these 144 comparisons, 96 (two thirds) showed statistically non-significant differences despite the large samples. 15 of the 19 statistically significant differences favoring ability grouping in elementary schools failed to persist or increase in the next three years. Although the greater proportion of significant differences favored the ability-grouped "superior" students, a corresponding majority of the significant differences for the "low" groups favored random grouping.

These findings are particularly important for black students. Whether a school has been recently desegregated or has served racially mixed student bodies for some time, the effect of ability grouping is to place disproportionately large numbers of black students in lower groups and disproportionately large numbers of white middle class students in top tracks. To the extent that ability grouping has unfavorable effects on those in low tracks, black students stand to lose far more than they gain.

This conclusion is borne out by McPartland (1969) who reanalyzed the data of the Coleman (1966) study of equality of educational opportunity as it pertained to black ninth grade boys in the Northeast. He found that blacks who attended desegregated schools with advantaged whites benefited academically only if they were placed in classes containing a majority of white students. There was a steady gradient in achievement effects as the proportion of white classmates increased. But ability grouping systematically works against classroom contact between the less competent students, black or white, and their more advantaged peers.

In a further recently published reanalysis of the Coleman data, McPartland and Sprehe (1972) have estimated the effects that could be anticipated if disadvantaged blacks were afforded the advantages of the school facilities, teachers, and interaction with higher achieving fellow-students enjoyed by their advantaged white contemporaries. Although all three advantages would have positive effects on the academic performance of disadvantaged black children, the study revealed the significant factor that interaction with advantaged students proved slightly more effective in improving achievement than did either benefits from better teachers or better facilities.

This conclusion conforms to the generalization already enunciated in our previous report, *Ability Grouping: 1970* (Findley and Bryan, 1971): *the effect of ability grouping is to deprive the low groups of self-respect, stimulation by higher-achieving peers, and often of helpful teacher expectations.* For evidence of the devastating effect of ability grouping on self-concept, interested readers should refer to the Borg (1966) study and to the British studies reported by Barker Lunn (1970). Suffice it to say that it is real and substantial.

Which Ways Out?

What, then, can be recommended to deal with these problems that result from ability grouping, and how can tests help in the process? First, better results cannot be expected if testing is tempered by teacher judgment in making assignments to ability groups. Kariger (1962) found that ability grouping based on test performance alone would indeed result in disproportionately large numbers of middle class children in top tracks and disproportionately large numbers of lower class children in low tracks. Despite the bias in the tests which produced these extreme misplacements, Kariger found that addition of teacher judgment produced *even greater* disproportions, apparently the result of the teachers' social-class stereotypes.

Second, tests may be used to detect the unsuspected skills of children who do not shine in recitation. "Findley's Law" — that you can't do better than you can do, but you may do worse — applies here. Test results can be used to raise an opinion about a child on the basis of what he has done, but should not determine opinions when negative scores seem incongruous with a child's recognized performance.

Third, test results can be used to produce more satisfactory groups than purely random assignment. If, for example, classes of 30 are to be established in a grade in a school that has far more than 30 children per grade, students should be grouped by tens. In a school with ninety children per grade, put the top ten, the

fourth ten and the seventh ten under Teacher A; place the second, fifth and eighth tens under Teacher B; and group the third, sixth and ninth tens under Teacher C. This "stratified heterogeneous grouping" will produce overlapping groups, each somewhat narrower in range than the total group, and each containing a nucleus of above-average students to stimulate the rest.

Fourth, criterion-referenced tests (measuring what a student can do, rather than how he does in comparison with others) related to behavioral objectives of instruction in the local schools should be purchased or developed. In this way children may seek to achieve mastery without regard to unnecessary normative comparisons with other students.

Classroom Alternatives

Finally, we cannot simply do away with ability grouping and expect that its absence alone will produce desirable results. Barker Lunn (1970) points out that the most unfavorable effects of classroom placement are produced when heterogeneous groups of children are assigned to teachers with strong "knowledge-centered" attitudes, but without a corresponding concern for personality development. Teachers should create a classroom atmosphere where moderately challenging goals can be adapted to the current competence of individuals. Teacher support of students in believing that mastery can be accomplished is also essential. In these classrooms, sub-grouping for instruction in accordance with criterion-referenced measurement is not only permissible, but recommended.

Encouragement of peer tutoring is a correlated practice. Use of older below-norm tutors in an ungraded class or from a higher grade in a graded school (Cloward, 1967; Gartner, Kohler and Riessman, 1971) is particularly promising. Findings to date indicate that tutors gain even more than those tutored!

During the 1973 meetings of the American Educational Research Association, Bloom reported that a significant outcome of programs of mastery learning is that teachers tend to gain a strong, positive attitude toward the ability of students to learn far beyond previous expectations. As a result, teachers set more challenging goals for each child, which they encourage and help him to achieve. It may be wiser to propose vigorous in-service programs designed to stimulate somewhat higher expectations to insure smoother transition, using Bloom's findings as a reinforcer. These and other alternative measures must be carefully examined and explored if we are to achieve fair and effective methods of responding to students' individual and varied educational needs.

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Creative Kids Don't Track

by Shepard Ginandes

Railroad tracks are laid for trains to follow. When the tracks are laid correctly, trains usually arrive at their destination. But if the tracks are broken en route, or if guerrillas or bandits ambush the train and destroy the tracks, where can the train go? With trains the alternatives are limited to "on" or "off" the track.

Tracks in education are just as categorical and linear as tracks for trains. Tracking has doubtless made life easier for administrators of mass education. If the school system thinks its job is to determine the amount and kind of information it can get to a great many students in a specific unit of time, it separates the supposed slows from the supposed smarts, the pretty smarts from the very smarts, and so on down the line. The separation is justified as a useful or necessary educational method. The illusion is that express trains won't get where they're going any faster than slow freights unless they are run on different tracks. But a tracked vehicle cannot explore the byways or get deeply involved with the environments it passes through.

For five years, the School We Have in Concord, Massachusetts, has pioneered a part-time program for young people who want to discover and develop their creativity. The School is also a therapeutic community in which the artists and craftspeople who are the teachers are also involved in group therapy *as equals* with their students. Emphasis is put upon the process of discovering what is unique about each student, and proceeding from where he can start to where he wants to go. We avoid concerning ourselves with the strictures of accreditation, so we *can* concern ourselves with each student's particular goals and problems.

From Both Ends

Many of our students are tracking victims: not only those who have been tracked lower than they should have been, but some who have been tracked with the intellectual elite. When a student is placed in a homogenized group below his ability, he is bored and stifled. His desire to learn and his enjoyment of learning wane and die. School becomes a torture. When students are tracked with an advanced program, they are often beset with academic competitiveness and pressure from teachers: "Surely you can do better than *that!* We know you have the potential." In the slow groups, there is mediocrity and boredom; in the accelerated groups, college becomes a "god."

Many kids are aware of how tracking labels and stigmatizes them. They don't select most of their courses or their teachers. Someone else dictates who they will share classes with year after year. Without the opportunity to choose for themselves, students are often victims of imposed grouping from the moment labels are applied. In a homogeneous population, there is little chance of being exposed to unique problem solving, or to creative or merely *different* ways of working. Like life in a low-income housing project or a middle class suburb, the atmosphere in a track functions to limit everyone's exposure in general, and to punish whoever is most different in particular.

And creative kids *are* different. As Getzells and Jackson point out in their book *Creativity and Intelligence*, the creative child at *any* intellectual level soon realizes that orderliness, systematic thinking, promptness, neatness, and general conformity are qualities beloved by his teachers and school administrators. But he also realizes that, try as he may, he will never be able to perform within these standard limitations. Creative children will be different because they think originally and express themselves in unique ways. The more categorically structured the environment, the more the creative child suffers.

Teachers, too, suffer from the problems of rigidity. Two years ago a highly creative and

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effective art teacher in a local high school lost her job. The main complaint was that she said "shit" in class. When I inquired about the firing, a school administrator said, "She was really not respectful enough of school rules generally, although she didn't actually break alot of them. She was seen as a kind of hippy — you know, not like the other teachers." Perhaps this school board did not know many artists or found no place for creative children or teachers in their system. But the board's attitude will insure that art students will only be exposed to the more domesticated teachers. The creative kids in schools like that one will be labeled and confined in class situations which are set up by people who do not know them, and most likely never will know them.

Abolishing the tracking system will require radical revision of the mentality which runs schools. When you work with young people who have continually disappointed the inappropriate expectations teachers have of them, you see the extensive damage to the quality of "humanness" — a damage that these constrictions foster. Repeatedly in psychiatry we observe that treating someone as a "patient" or "retardate" or "inmate" hurts his human uniqueness, yet psychiatric, educational and correctional institutions continue the practice. In my book, *The School We Have*,* I document some of these cases.

Years ago, pediatricians scrubbed a floor, laid a variety of foods upon it, and allowed crawling infants to select and eat what they found appealing. On an overall basis the infants selected a balanced diet. At The School We Have, where students select their own courses, they also choose to "graduate" themselves when they feel they've got what they came for. Much more often than not, students "graduate" at the time that is right for them.

Retaining Uniqueness

To think in terms of abolishing the injustices of the tracking system is as negative an approach to education as treating disease is to medicine. Health is *feeling good*, and real education is *enjoying learning*. To make learning enjoyable again we must have smaller and more intimate learning environments, and teachers who can remain people. Many young teachers today want to learn how to stay

Photo: Ne'ama Ansell

vibrant, stimulating and stimulated in the classroom despite the IBM atmosphere of our schools. How can they be helped to retain their humanity in the prevailing school structures? At The School We Have we have been training teachers and helpers for five years. Not only is training of creative teachers possible and successful, it is so rewarding that teachers *want* to come to school. The contrast of our teachers' excitement with the "Thank God It's Friday" cries emanating from the teachers' lounges at the "trackeries" suggests that *everyone* involved in the education process can benefit from an approach to education which allows both students and teachers to maintain and develop their individuality and human uniqueness.

* Ginandes, S. *The School We Have*, Seymour Lawrence/Delacorte Press, 1973.

An Alternative That's Working

by Edith W. Jensen

> "I like IGE [Individually Guided Education] because you get to choose what folder that you want to do. This is my first time I have ever had this kind of experience, and I think it is fun. The teachers is what make IGE fun. Whatever started this program must be really smart. If any school don't have IGE, I would not call it a school."
>
> Student[1]

> "I like IGE because the students and teachers like it! The atmosphere is relaxed and stimulating at the same time. Each student seems eager to work and achieve at his own level and own pace, and they all seem to be enjoying it thoroughly. It just makes sense that you learn more when you're enjoying it. My hat is off to the teachers who have a tremendous amount of work to do to make IGE work, and to the students who are making it all worthwhile."
>
> Parent[1]

These responses from participants in the *Individually Guided Education* (IGE) system are typical of the support and enthusiasm which this alternative learning and teaching system generates.

The IGE system was primarily researched and developed by the Wisconsin Research and Development Center for Cognitive Learning[2] and the Institute for Development of Education Activities (*IDEA*),[3] a division of the Kettering Foundation. In the mid-sixties, development of these multi-unit schools began in Wisconsin, and by the 1970-71 school year, 164 IGE or multi-unit schools were operating in eight states. During the 1972-73 year more than 1,000 IGE schools existed in 33 states and in some foreign countries. Some schools have contractual agreements with either the Wisconsin Center or *IDEA*, while some schools, through their own intermediate agency, have agreements with both. Both agencies have developed professional training programs and audio-visual and print materials.

As an alternative to more traditional methods of classroom programs and teaching, IGE is based on several underlying concepts about how children learn:

(1) Students differ not only in general intellectual capacity but also in success with different subjects in a curriculum; (2) varying learning styles, interests and personal interactions with adults and peers affect the success of the child in school; and (3) learning how to learn, becoming self-directed, developing a positive self-concept and mastering group processes are viable and vital education goals.

Individually Guided Education can be defined as a framework for personalizing the total school program for the elementary school child. Although its concept is not a new one, IGE has brought together a working program for educational innovation and created a manageable system which emphasizes individualization, planning, organization, community participation and professional self-improvement. The design includes grouping for specific and meaningful purposes while avoiding the detriments of the traditional ability grouping programs. This is facilitated by non-graded instruction in which each student works in various learning modes (small group, large group, one-to-one, independently) according to his instructional objectives and learning styles, and regardless of age or years in school.

Continuous progress in learning at a rate

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determined by each student's needs, interests and abilities is achieved through team teaching in which groups of teachers and pupils plan learning programs, assess progress and design diversified learning activities. Teachers divide teaching assignments to capitalize on their teaching strengths and interests, and to match the student with the teacher who suits him best for a specific learning task. These teams are structured by differentiated staffing, where the instructional team (or unit) consists of a unit leader, staff teachers, interns and para-professionals. Professional growth through continuous in-service professional training and guidelines for assessing individual, unit and school progress in the change program is also an integral part of the system.

The Transition

Becoming an IGE school is a slow process because it requires a change in the total school program. The key to success is the principal's and teachers' thorough preparation and knowledge about IGE and commitment to it. Even though a school can expect to need three to five years to implement the new approach, some schools that have been involved for five years report that they are not yet ready to say "we are there."

Cost increases depend largely upon the investment a school district wishes to make, and are primarily due to salaries for para-professionals, amount of professional training for faculty, and instructional materials. Some schools use volunteer aides, but most pay clerical or instructional aides; some schools adapt existing curricular materials, while others purchase new programs. The Wisconsin Research & Development Center suggests that $10 to $20 per child is needed for each of the first two years of implementation based upon one instructional aide per 150 children. The lower figure applies to schools using volunteer aides and limited additional instructional materials.

The Structure

Shared decision-making and group planning are made possible by the multi-unit organizational plan used by an IGE school. The unit is the non-graded organization for instruction that replaces the age-graded, self-contained classroom. Each unit consists of a unit leader, 3 to 5 teachers, an instructional aide, a clerical aide and 75 to 150 children. Children from 2 or 3 age or "grade" levels compose each unit, reflecting the achievement range, sex and racial ratios of the entire school. The primary function of the unit is to plan and carry out the instructional program for *each* child.

Creating and designing learning programs is the heart of IGE. These programs include the goals, objectives, assessments and activities related to what will be learned as well as the space, time, personnel and mode desirable to facilitate learning. IGE is not packaged subject matter programs or prepared outlines of behavioral objectives. Teams plan units of work together utilizing a planning system and incorporating whatever commercial and teacher-made materials, texts, audio-visual aids, etc. are appropriate for their students and the learning objectives involved.

During the first year under the IGE program, schools select one subject matter area for individualization and undertake an additional subject area each year thereafter. Initially school-wide goals are established according to what the community, the school board, administration and teachers deem priorities. The team then builds learning programs around those goals by:

1. Identifying the instructional objectives related to the goal.
2. Planning diversified learning activities which will lead to mastery of the objectives.
3. Assessment prior to, during and after instruction to determine the students' progress toward specific objectives.
4. Creating facilitative learning environments which consider learning styles, modes and relationships as well as allowing students to choose learning activities and develop self-direction.

"Individualization" all too often has the synonym "isolation." If children in an individualized program spend most of the day isolated from one another, how will they learn cooperation and other group processes required for success in the adult world?

In IGE, the small group of 3-11 is most prevalent. Those with similar learning needs or

interests are grouped together for the time necessary to accomplish a specific task. During any one day a child may work with several different groups of children, alone, with one teacher, and participate in a large group. Because the team includes 75 to 150 children, there is ample opportunity for identifying children with similar learning objectives and creating manageable small groups within the larger group. Regrouping occurs as progress toward instructional objectives is made.

Grouping is not based on standardized achievement test or IQ scores. Instead, assessment devices (i.e., commercial criterion referenced tests) are either selected or created by teachers to indicate what specific progress a child has made and whether he has attained the desired objective. Assessment may be in the form of a test, teacher observation or conference, or demonstration by the pupil. At times, grouping is based entirely on interest in areas included in the unit of work.

IGE does not follow the traditional assumption that a 10 year old should be in the fifth grade, and should start the school year with page 1 of a text for 5th graders! Children not only know their learning objectives but participate in choosing them. This method is successful because teachers can identify what the student has learned and help him build upon it.

Home-School-Community Relations

Communication with the community and parents is vital before and during implementation of the system. A major effort is made to communicate basic goals and components of the IGE system, and to create methods of reporting pupil progress, which often accounts for greatest parental concern. Programs that include parents and community leaders in planning and problem solving have been found extremely beneficial.

Ten to fifteen schools implementing the IGE program join together to form a league of cooperating schools. A league provides a system for mutual support against resistance to change, and a mechanism for sharing information and experience. Newsletters, workshops and teacher exchanges are organized by a hub committee that consists of a representative from each participating school.

South Carolina Overview

Individually Guided Education was introduced in South Carolina in 18 elementary and 2 middle schools in 1971-72. 24 more schools joined the program in 1972-73, bringing the number to 37 elementary and 7 middle schools. These are located in 30 school districts and enroll approximately 20,000 of the 380,000 elementary and middle public school children in South Carolina including urban, rural and

Photo Gail Levin

suburban schools; probably no school in South Carolina would be classified "inner city" according to a national definition of the term.

All of these IGE schools utilize the unit organizational pattern but ten are not yet totally reorganized into units. Two thirds have multi-aged units and the others are working toward it. All schools can reach these goals as financial resources increase, curriculum changes are made, and teacher attitudes and relationships develop into those necessary for effective team teaching.

IGE instructional programming has been implemented in the subject matter areas of language arts (primarily reading), mathematics and social science or science. Some schools have incorporated commercially prepared curriculum programs, but most design their own programs using extensive varieties of texts, materials, and audio-visual aids.

Rather than isolating special education students, South Carolina IGE schools incorporate these children as regular members of units. The special education teacher works in the unit with individuals and small groups, or students go to a resource room for given periods each day. In this way the special education teacher shares his or her expertise with the team.

Although more flexible space is helpful for the programs, it is not essential. Openness and flexibility, after all, are more attitudinal than architectural! Half of the schools have not modified the traditional building, but four new buildings were specifically planned for team teaching, and therefore are more "open." In the remaining schools, some walls have been removed or additions built.

Many IGE schools in South Carolina have received federal title funds of one kind or another. But even with the uncertainties of such funding at this time, no school has indicated that it will drop out of the program next school year.

The state Department of Education serves as the intermediate agency, and has a contractual relationship with both *IDEA* and the Wisconsin Research & Development Center. A full-time facilitator is provided to implement IGE in participating schools and to coordinate the program throughout the state.

Each school principal and district superintendent signs an agreement with the intermediate agency to make the necessary provisions for successful implementation. Included are reorganization of the school, transfer of teachers who do not want to participate, provision of paraprofessionals, released time for planning, participation in in-service programs and leagues, and the designation of a district IGE coordinator. Periodic assessment of a school's progress is made through visits by the state facilitator and devices developed by *IDEA*.

South Carolina schools are currently participating in studies by developmental and intermediate agencies to evaluate certain aspects of the IGE program. The kind of specific data our school boards often look for, however, will not be available for several years. Half of our schools have just completed their first year of implementation and the other half their second. Since one subject matter area is individualized each year, it will be at least 3 or 4 years before the entire curriculum is involved and the effects of the change can be fairly compared to the "old" way. In addition, we are not only concerned with "measurable" increases in standardized achievement test scores; all-important self-concept and attitudes toward learning are more difficult to measure and compare.

Through inteviews with children, teachers, principals and parents, however, we believe that we are on the right track. Attendance is up; suspensions are down. Teachers and principals say they are working harder and longer than they ever have, but most do not want to return to the self-contained, departmentalized or ability-grouped classroom. Children are enthusiastic, and usually say they like school better this year. Gregory Hughey gets the message across: "I like Math very much. When she past out the paper Boy I get redy. I try to be quiet." Wait 'til next year when his school adds language arts to its IGE program!

Footnotes

[1]Quoted from "IGE Spokesman," Volume 1, January and February, 1973, Number 3, Columbia, South Carolina Public Schools.

[2]Wisconsin Research and Development Center for Cognitive Learning, 1025 West Johnson Street, Madison, Wisconsin 63706.

[3]Institute for Development of Educational Activities, Inc., 5335 Far Hills Avenue, Suite 300, Dayton, Ohio 45429.

Notes and Commentary

This section of Inequality in Education *features reports on research, litigation, government action, and legislation concerning education and the law. Readers are invited to suggest or submit material for inclusion in this section.*

INDIAN EDUCATION: Title I, J-O'M, Discrimination

Court Finds Violations of Title I, Johnson-O'Malley, and Racial Discrimination Against Indians

Natonabah v. *Board of Education of Gallup-McKinley County School Dist., et. al.*, 355 F. Supp. 716 (D.N.M. 1973).

The recent Federal Court decision in *Natonabah* v. *Board of Education of Gallup-McKinley County School Dist.* provides new and important precedent in the law relating to Title I and Johnson-O'Malley funds, and discrimination in the provision of equal educational opportunity. Significantly, it is the most extensive holding to date on intra district disparities which are the sort that will crop up in virtually every district in which a dichotomy exists between a white anglo majority and a non-white minority. The case constitutes one of the first direct holdings that a district has violated the federal regulations that govern the expenditures of Title I (ESEA) monies. In a matter of first impression, the court also held that local school officials had violated the Johnson-O'Malley Act and federal regulations which govern the expenditure of Johnson-O'Malley funds.

In *Natonabah* the court found that the following disparities constituted violation of equal protection:

1. A significant difference in per-pupil building valuations (based on insurance evaluations) that favored non-Indian students. It is likely that this pattern will exist in practically every school district in the country where blacks and other minorities in the inner city attend older schools of substantially lower valuation than those attended by whites in the surrounding areas.

2. Greater use of portables in the Indian schools. Instead of rebuilding outdated and overcrowded inner city facilities, most districts merely add portable classrooms. In addition to the harm stemming from this practice as outlined by the court, it should be noted that portables substantially reduce recreation space, usually more limited in regular inner city school buildings anyway.

3. Money from bond issues was disproportionately awarded to white schools. Part of the district's justification for this practice, implicitly rejected by the court, was that the bond issues could not be passed without such a misallocation. Unfortunately, similar pressures are likely to make other districts engage in the same practice.

4. Higher per-pupil valuation of equipment in white schools, where newer facilities designed for whites often had more up-to-date equipment. This policy is often carried out, consciously or subconsciously, with the thought that college bound whites are more deserving of advanced expensive equipment.

5. Higher teacher salaries in white schools. This results from the common practice of allowing teachers with more experience to choose their schools. The more experienced, higher salaried teachers usually opt for the white schools.

6. Inadequate library collection, library services and guidance services in the Indian schools.

7. Per-pupil expenditures, excluding the Federal Supplemental funds from Johnson-O'Malley and Title I, were higher in the white community. This factor is a common product of the discriminations previously listed.

It should be noted that the court specifically held that the above disparities constituted violations of equal protection even though there was no showing of purposeful discrimination. The court cited the recent Supreme Court decision of *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 92 S. Ct.

2196 (1972) for this proposition.

The Title I (20 U.S.C. 241(a)) claim had alleged that Title I money was "supplanting" basic support programs in violation of the Act and regulations, and that Title I materials were being used by non-Title I schools. The court found that Title I (and Johnson-O'Malley) money was improperly supplanting district funds in the provision of nurses and counselors. In addition, it found that an inordinate amount of administrative costs were allocated to Title I. Finally, the court ordered the relocation of all equipment purchased with Title I funds to Title I schools.

Several factors should be noted about this Title I holding. First, *Natonabah* is one of the first decisions directly finding supplanting. Secondly, the court's finding of supplanting is closely correlated with a previous finding of Title I auditors. (It might be a wise decision to examine any such audit previously conducted.) Finally the supplanting and misallocation found in *Natonabah* is similar to that which occurs in many districts throughout the country.

The Johnson-O'Malley (25 U.S.C. Sec. 452) claim was similar to the Title I claim. In essence, it alleged that Johnson-O'Malley money, which is designed for the special educational needs of Indian children, can only be used for those specific purposes, and cannot supplant basic programs. The court, in a holding of first impression, agreed. The court held that at least where Impact Aid is available to a local school district, additional sums appropriated under the Johnson-O'Malley Act *must* be used to meet the special educational needs of Indian children; any use of Johnson-O'Malley funds which replaces district funds is improper supplanting.

In sum, *Natonabah* has significant implications that go well beyond its immediate holding. It should be read by anyone interested in educational law.

Peter Roos

Court Orders President & HEW to Implement New Indian Education Act

Minnesota Chippewa Tribe v. *Carlucci*, C.A. No. 175-73 (D.D.C. order of May 8, 1973).

The promise of the Indian Education Act of 1972, which had been blocked by non-implementation and the impounding of funds, will now become a reality as the result of law suits brought by Indian tribes and organizations represented by the Center for Law and Education, the Native American Rights Fund (NARF) in Boulder, Colorado and other Indian attorneys.

On May 8, 1973 federal district Judge June L. Green of the District of Columbia set a tight timetable (before the June 30th expiration of the current fiscal year) for publishing of regulations, processing of applications, and obligation of $18 million for Indian education. This ruling came two weeks after Judge Green issued a precedent-setting order (filed April 25, 1973) holding the President subject to the court's jurisdiction.

These orders came in a suit to compel implementation of the Indian Education Act of 1972 (P.L. 92-318). The Act, the first Indian education legislation in 36 years, authorizes innovative and compensatory programs in public schools, community-controlled schools, adult education and higher education. Unlike other programs, however, the 1972 Act delegates broad decision-making responsibilities to Indian people. At the community level, Indian parent groups are given veto power over proposed programs in local schools. At the national level, a new Bureau of Indian Education, established within the U.S. Office of Education, is under the supervision of a National Advisory Council on Indian Education, consisting of fifteen Native Americans appointed by the President.

The Indian Education Act of 1972 also differs from other federal Indian programs in that it is designed to serve Indian people in all parts of the nation, whether or not they are affiliated with a federally recognized Indian tribe. Approximately 50% of all Native Americans live in places other than federally recognized Indian reservations, some on state-created reservations (such as the Passamaquoddy in Maine), others in urban areas (such as Los Angeles or Phoenix), and still others (like the Lumbees of North Carolina) who live together in distinct non-reservation communities. The Act is particularly significant to Indian peoples whose needs have previously been ignored by the federal government.

Although the administration opposed the legislation when it was pending in Congress,

the Act became law. And despite the further objections of then Commissioner of Education Sidney J. Marland, Congress appropriated $18 million to begin immediate implementation. The first necessary implemental step was for President Nixon to appoint the members of the National Advisory Council on Indian Education. On August 18, 1972 the Office of Education wrote to all known Indian tribes and organizations requesting nominees for appointment to the Council; more than two hundred names were submitted by October. But instead of making the appointments, the President requested Congress to rescind its appropriation in his February Budget Message.

After that Message, the Center for Law and Education and NARF were asked to bring suit. (Other groups, including the Coalition of Indian Controlled School Boards, filed suit later after their applications for funding were denied.) The complaint filed in federal district court in Washington, D.C. requested three things: (1) a mandatory injunction ordering President Nixon to appoint the National Advisory Council; (2) a mandatory injunction ordering officials of the Department of Health, Education and Welfare and the U.S. Office of Education to promulgate necessary regulations, receive and process applications and take other steps to implement the Act; and (3) a mandatory injunction ordering HEW officials to spend the money appropriated by Congress by the end of the fiscal year.

Acting Commissioner of Education John Ottina testified in his deposition that the Act could not be implemented without participation by the National Advisory Council. The President's failure to appoint members to the Council, it was argued, was preventing the implementation of a law created by Congress. Department of Justice lawyers for the President and HEW invoked the doctrine of separation of powers and asserted the suit must be dismissed because Presidential action is indispensible and "the Court lacks jurisdiction over the President."

Judge Green disagreed. Recognizing that the Indian "plaintiffs' only remedy is to sue the President directly," the court distinguished this case from prior decisions on the ground that plaintiffs were not seeking to interject the court into discretionary functions of the Executive, but merely seeking to compel the performance of the single act of appointments to the Advisory Council. The court concluded that the "President of the United States is not completely immune from the judicial process for the sole reason that he is President."

Ten days after the court ruling, and two days before a scheduled hearing to determine if an injunction against President Nixon should be issued, fifteen Native Americans were appointed to the Advisory Council. At the same time, the Office of Education moved swiftly to speed implementation of the Act. On May 7, government attorneys asserted in court that the administration was "voluntarily" granting the relief sought by the plaintiffs, but the court incorporated the proposed timetable into a formal order which had the effect of law, and required the Administration to report by June 15th on its progress in implementing the Act. As the *Tundra Times* (of Fairbanks, Alaska) stated, the Administration's 'foot-dragging approach to funding has impeded that intention [that native people control and direct their own educational programs] and sparked a last-minute scramble for valuable education money."

Daniel M. Rosenfelt

BILINGUAL

Court Orders Expansion of Bilingual Programs

Serna v. *Portales Municipal Schools*, 351 F. Supp. 1279 (D.N.M. 1972).

In *Serna* v. *Portales Municipal Schools* plaintiffs were Spanish surnamed students who alleged a denial of equal educational opportunity in that the school's educational program was tailored for middle class anglo children without regard for the educational needs of Spanish speaking children. The court found for the plaintiffs after noting that the expert testimony showed a negative impact on Spanish surnamed students demonstrated by lower IQ scores, achievement scores and language ability.

The court discounted arguments that the special needs of plaintiffs were not the result of state action, and that financial considerations made expansion of current bilingual-bicultural

programs impossible. It further found it incumbent upon the district to obtain sufficient certification for Spanish speaking teachers to allow them to teach in the district if other recruiting practices failed to produce sufficient numbers of Spanish speaking applicants.

At least one court has specifically refused to follow the reasoning of the *Serna* decision. In *Morales* v. *Shannon*, 41 L.W. 2451 (W.D Tex. 1973) the court chose instead to follow the Ninth Circuit's holding in *Lau* v. *Nichols*, 472 F.2d 909 (9th Cir. 1973). The Supreme Court has recently granted certiorari in *Lau* and presumably will shed further light on the issues raised by the *Serna* case.

Roger L. Rice

DESEGREGATION

Desegregation Moves North

Keyes v. *School District No. 1, Denver, Colorado*,___U.S.___(No. 71-507, O.T. 1972, decided June 21, 1973).

In its first full opinion in a Northern school segregation case the Supreme Court has moved towards national uniformity with respect to both identifying and remedying unconstitutional racial and ethnic segregation.

The District Court had held, as have many others, that school board policies and practices that deliberately render schools racially identifiable are as unconstitutional as racially explicit state laws to the same effect. 313 F. Supp. 61 (D. Colo. 1970). Finding that a number of Denver's schools were illegally segregated, the District Court ordered them to be desegregated, and to that extent its holding was affirmed by the Court of Appeals and the Supreme Court. 445 F. 2d 990 (10th Cir. 1971). The District Court also found, however, that the plaintiffs had failed to prove the illegal nature of the racial identifiability of a number of other schools. Nevertheless, it required them to be desegregated on the ground that their racial isolation, together with the uniformly lower achievement test scores of students, constituted a denial of equal protection for which, according to the record, desegregation would be the most promising remedy. To that extent the Court of Appeals reversed the District Court, holding that it had erred in going beyond ascertaining and remedying "de jure" segregation in the schools affected by illegal policies and practices. Cross petitions for certiorari followed and that of the original plaintiffs was granted.

Mr. Justice Brennan, in an opinion joined by Justices Blackmun, Douglas, Marshall and Stewart, held that the lower courts had erred in the standard used to determine comprehensive illegal segregation. The proper standard, to be applied in further hearings following remand, is that all racially identifiable schools in a system are presumed to be illegally so, where the plaintiffs have proved more than trivial or insubstantial practices. The remedy must be comprehensive unless the defendants can prove that the segregation of particular schools is wholly unrelated to their policies and practices. The Court withheld its view of the District Court's "racial isolation - lower outcomes" analysis.

Chief Justice Burger concurred in the result. In a separate concurring opinion Mr. Justice Douglas would discard entirely the de facto - de jure distinction between innocently and illegally segregated schools. In another separate opinion, partly concurring and partly dissenting, Mr. Justice Powell would also discard the de facto - de jure analysis, but would significantly limit the remedies of reassigning and transporting pupils applied since *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 (1971). Mr. Justice Rehnquist dissented.

The case is significant and helpful to plaintiffs in that it rejects the school by school segregation analysis espoused since 1970 by the Government (HEW and the Justice Dept.) and defendants in non-statutorily segregated districts. There is no reason in law or policy to require plaintiffs to show more than present segregation and a nexus with some effective discriminatory conduct, and the Court has so held.

In addition, the Court held that schools which enroll a combined disproportion of black and Hispano children are as racially identifiable as those which enroll a disproportion of one or the other. This will prove significant in those Southwestern districts in which school authorities have purported to comply with *Brown* by combining black and brown schools while insulating anglo schools from change.

SCHOOL FINANCE

Supreme Court Upholds Constitutionality of Local Property Taxes for Financing Schools

Rodriguez v. *San Antonio Independent School District*, 337 F. Supp. 280, 282 (W.D. Tex. 1971)

On March 21, 1973, the United States Supreme Court in *San Antonio Independent School District* v. *Rodriguez*[1] held that the Texas school finance program did not violate the Fourteenth Amendment of the United States Constitution. Many readers may be familiar with the facts leading up to the decision. In 1967-68, through the combination of local property tax revenue and state school aid, the Texas school district of Edgewood had $231 per pupil to spend in its schools, while the nearby district of Alamo Heights had $543 per pupil, despite the fact that Alamo Heights had a lower school tax rate.[2] This pattern was not unique to schools in the San Antonio area. In a sample of 110 Texas school districts, the ten wealthiest in terms of taxable property per pupil had an average of nearly three times as much total state and local revenue per pupil than the four poorest districts.[3] Late in 1971, a three-judge District Court held that the Texas program violated the Equal Protection Clause in part because "[i]t makes education a function of the local property tax base."[4] The District Court found that more than $1 billion in school aid annually distributed by the state did not correct the disparities created by variations in local property wealth to any significant degree: "Any mild equalizing effects that state aid may have do not benefit the poorest districts."[5]

The Supreme Court reversed the District Court's decision by a 5 to 4 vote. Mr. Justice Powell, for the Court, rejected plaintiffs' contention that the Texas school finance scheme should be subjected to a compelling state interest test because it created a suspect class based on wealth affecting the fundamental interest in education. First, the District Court's holding that the Texas law created a suspect class based on wealth was overruled. For such a class to exist under recent opinions involving wealth discrimination, the Court indicated it would have to find that people beneath a specific poverty level were clustered in school districts with low per pupil property wealth. The plaintiffs, however, "made no effort to demonstrate that [the Texas law] operates to the peculiar disadvantage of any class fairly definable as indigent."[7] Powell noted that even if a sufficiently strong nexus between poor people and property-poor school districts were found, a suspect class for Equal Protection purposes would not exist because there has not been an "absolute denial of educational opportunities ... only relative differences in spending levels."[8]

The Court went on to deal with plaintiffs' assertion that education was a "fundamental interest." Powell conceded that education plays a "vital role in a free society,"[9] but found that it "is not among the rights afforded explicit protection under the Federal Constitution."[10] Moreover, although education can be deemed necessary to exercising the fundamental interests of speech and voting, there was no proof that Texas' poorest districts failed to provide students with the basic skills needed to participate in society.[11]

Because it found neither plaintiffs' fundamental interest nor economic discrimination arguments sufficient to trigger a "compelling state interest test," the Court applied the "traditional standard of review, which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes."[12] The Texas school funding program meets this test, according to the Court, principally because "Each locality is free to tailor local programs to local needs."[13] Powell added that the Court would not intervene in a system for financing public services "merely because the burdens or benefits thereof fall unevenly depending on the relative wealth of the political subdivisions in which citizens live."[14]

In a lengthy dissent, Mr. Justice Marshall, joined by Mr. Justice Douglas, took issue with each of the major conclusions reached by the majority.[15] He suggested that the Court applied an unreasonably strict test in denying the existence of a disadvantaged class.[16] In particular Marshall criticized Powell's assertion that absolute deprivation of a benefit was required. Marshall pointed out that in *Griffin* v. *Illinois*[17] and *Douglas* v. *California*[18] the benefit — the

right to appeal a criminal conviction — was not absolutely denied. Rather, in each case the appellant had the right to appeal as a matter of law, but Griffin couldn't afford a transcript of his trial and Douglas couldn't pay an attorney to prepare his appeal.

Similarly, Marshall rejected Powell's determination that interests are fundamental only if they are "explicitly or implicitly guaranteed by the Constitution."[19] He suggested that this formulation ignores precedents of the court,[20] leads to a "rigidified" approach to equal protection cases,[21] and obviates the entire "fundamental interest" phase of Equal Protection jurisprudence.[22]

Building on his dissent in *Dandridge* v. *Williams*,[23] Marshall suggested that the test which should be applied in all Equal Protection cases is the same: "We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the state has sought to advance its interests."[24] The severity of the standard would vary along a spectrum in accordance with "the constitutional importance of the interest at stake and the invidiousness of the particular classification."[25] In this case, according to Marshall, "both the nature of the interest and the classification dictate close judicial scrutiny" of the Texas law.[26] Based on this test, "the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local control."[27]

Patterns of school funding inequities revealed in this Texas case and in its famous California predecessor, *Serrano* v. *Priest*,[28] can be found in nearly every state. The local property tax base, from which over 52% of the revenue used in public elementary and secondary schools is raised,[29] is very unevenly distributed among school districts of each state. The National Educational Finance Project found that in samples of large districts in each state the ratio of the district with the greatest taxable property wealth per pupil to the district with the least ranged from 2.15 in North Dakota to 84.52 in Texas.[30] Most states attempt to ameliorate the effects of these disparities through various types of equalization aid. These equalization efforts, however, are woefully inadequate. In 1969-70, the ratio of highest spending district to lowest spending district on a per pupil basis varied from 1.4 in West Virginia and North Carolina to 23.6 in Wyoming.[31] Thirty states had high/low ratios equal to or greater than 2.5.[32]

What, then, is the future of school finance reform after *Rodriguez*? The decision appears to effectively foreclose litigation in federal and state courts based on the Equal Protection Clause of the U.S. Constitution.[33] Litigation in state courts is continuing, however, relying on state constitutional provisions.[34] *Serrano*, for example, was based on state as well as federal equal protection grounds.[35] Many states also have constitutional provisions relating more directly to equality in education. Recently, the Supreme Court of New Jersey used a state constitutional clause requiring a "thorough and efficient" public school system to strike down the state school finance scheme.[36] Although these cases are important advances, a question should be raised about the prospects for widespread success in the state courts. Are state judges, usually elected rather than appointed for life, politically independent enough to render the types of decisions which may lead to massive redistribution of public revenue, often to the disadvantage of powerful interests?

The prognosis for reform through state legislatures is not particularly optimistic either. Even if *Rodriguez* had been affirmed, it is not altogether clear that the fragmented reform movement[37] could have overcome the objections of suburban legislators to achieve meaningful reform.[38] Now the task will be even more difficult.

A final avenue for reform may be Congress. Several bills have been introduced to provide federal aid for reducing intrastate spending disparities. While federal incentive programs would undoubtedly hasten the reform, this proposed expenditure must be viewed alongside the competing priorities for the federal education dollar, such as continued funding for Title I of ESEA.

In short, *Rodriguez* was a severe blow to the school finance reform movement. A great deal of energy was concentrated on this case by people favoring the plaintiffs' theories. Whether this energy can now be effectively dispersed and applied to legislatures and state courts is still an open question.

Thomas J. Flygare

Footnotes

[1] 93 S.Ct. 1278.

[2] *Rodriguez* v. *San Antonio Independent School District*, 337 F. Supp. 280, 282 (W.D. Tex. 1971).

[3] Brief for appellees at 11, *San Antonio Independent School District* v. *Rodriguez*, 93 S.Ct. 1278 (1973); Berke, et. al. *The Texas School Finance Case: A Wrong in Search of a Remedy*, 1 J. L. and Educ. 659, 663 (1972). Predictably, there was a strong inverse relationship between property wealth and percentage of minority children: the ten wealthiest districts had an average of 8% minority while the figure for the four poorest was 79%. *Id.*

[4] *Rodriguez* v. *San Antonio Independent School District*, 337 F. Supp. 280, 282 (W.D. Tex. 1971).

[5] *Id.*

[6] Joining the Powell opinion were Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist. Justice Stewart also filed a separate concurring opinion.

[7] 93 S.Ct. 1278, 1291 (1973).

[8] *Id.* at 1299.

[9] *Id.* at 1295.

[10] *Id.* at 1297.

[11] *Id.* at 1298-99.

[12] *Id.* at 1300.

[13] *Id.* at 1305. In his dissent, Mr. Justice White argued that any flexibility implicit in local control was thwarted in Texas' poorest districts due to a state-imposed ceiling on the school tax rate. *Id.* at 1314. Mr. Justice Powell responded by pointing out that the school tax rate in Edgewood was only about one third of the ceiling level, and adjudication of that issue would have to await proper challenge. *Id.* at 1305-06, n. 107.

[14] *Id.* at 1307-08.

[15] Justice Brennan filed a short dissent noting that because education should be considered a fundamental right due to its close relationship with explicit constitutional rights, "any classification affecting education must be subjected to close judicial scrutiny...." *Id.* at 1312. Justice White, joined by Justices Brennan and Douglas, without discussing the fundamental right issue, dissented on the ground that the Texas finance scheme was not rationally related to the valid objective of local control of the schools. *Id.* at 1312-15.

[16] *Id.* at 1329. Also see *Id.* at 1340-43.

[17] 351 U.S. 12 (1956).

[18] 372 U.S. 353 (1963).

[19] 93 S.Ct. 1278, 1330-31.

[20] *Id.* at 1331.

[21] *Id.* at 1330.

[22] *Id.* at 1331, n. 59.

[23] 397 U.S. 471, 519-521 (1970).

[24] 93 S.Ct. 1278, 1334.

[25] *Id.* at 1343; also see *Id.* at 1330.

[26] *Id.* at 1344; also see *Id.* at 1348.

[27] *Id.* at 1345. Citing state laws regulating courses, textbooks and teacher certification, Marshall concluded that "local control is offered primarily as an excuse rather than as a justification for interdistrict inequality." (*Id.*) In response, Powell wrote that this assertion "is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code." (*Id.* at 1306, n. 108.)

[28] 5 Cal.3rd 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[29] Advisory Commission on Intergovernmental Relations, State Aid To Local Government, 186-87 (1971).

[30] These ratios existed among samples from each state of no more than 17 districts each with average daily attendance in excess of 1500. Hawaii was excluded because it only has one school district. National Educational Finance Project. Vol. 4: Status and Impact Of Educational Finance Programs. 57-58 (1971).

[31] Berke and Kelly, The Financial Aspects of Equality Of Educational Opportunity, 8-9 (1971).

[32] *Id.*

[33] Stewart's concurring opinion must be examined in considering this conclusion. His failure to confirm the Court's insistence on an "absolute deprivation" of the benefit might suggest his disagreement with that portion of the majority opinion. However, he adopted the Court's approach in rejecting the remainder of plaintiffs' theory of wealth discrimination at 1311, n.6. Compare with Powell's treatment of the issue at 1291. In addition, Stewart explicitly joined the Court's holding that the Texas law impinged on "no substantive constitutional rights" at 1311.

[34] Browning and Lehtman, Law Suits Challenging State School Finance Systems, (1972). Included in U.S. Senate Select Committee on Equal Educational Opportunities, Issues In School Finance 165-190 (1972). Of the *Serrano-Rodriguez* type cases pending, thirty-four are based in part on state grounds and twenty-nine of these on state equal

protection clauses.

" 5 Cal 3d. 584, 596 n 11, 487 P.2d 1241, 1249 n 11, 96 Cal Rptr 601, 609 n 11 (1971). See Coons, Clune and Sugarman, A First Appraisal of Serrano, 2 Yale R. L and Soc Action 111,112 (1971), for an interesting discussion of the court's treatment of the state law issues in *Serrano*

" *Robinson* v *Cahill*, _ N J _ (April 3, 1973) The opinion was prepared before the U S. Supreme Court rendered *Rodriguez*. In a lengthy insertion, the New Jersey Supreme Court used *Rodriguez* to buttress its conclusion that the state school funding scheme violated neither the federal nor state equal protection clauses. It did find, however, that the New Jersey school finance law ran afoul of a state constitutional provision requiring the legislature to maintain and support a "thorough and efficient system of free public schools . ." N.J. Const Art. IV, Sec 7.

" Dimond, *Serrano. A Victory of Sorts for Ethics, Not Necessarily for Education*, 2 Yale R. L. & Soc. Action 133-41 (1971); Berke and Callahan, *Serrano* v. *Priest: Milestone or Millstone for School Finance*, 21 J. PUB. L. 23 (1972) Myers, *Second Thoughts About Serrano*, CITY 38 (Winter, 1971). Many of the questions about legislative response under the *Serrano* principles were raised by urban education interests. It was suggested that the principal beneficiaries of legislation comporting with *Serrano* would be property-poor school districts Because many urban school districts are property-wealthy, they might actually realize a net loss of state school aid. Moreover, *Serrano* was criticized because it failed to compel legislative recognition of several fundamental fiscal and educational characteristics of urban school districts such as higher costs, greater educational needs of students and municipal overburden See Brief for Mayor and City Council of Baltimore, et. al., as *amici curiae* at 5-14, *San Antonio* v. *Rodriguez*, 93 S.Ct. 1278 (1973).

" See generally, *School Finance Litigation: A Strategy Session*, 2 Yale R L. and Soc. Action 160-63 (1971); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 Yale L. J. 409 (1973).

Photo Gail Levin

STUDENT RIGHTS

Due Process of Law in School Discipline: Recent Decisions

This note summarizes and comments on decisions, mostly recent, bearing on students' rights to due process of law in school discipline.[1] The topics covered are: (1) students' use of the due process approach of *Board of Regents* v. *Roth*, 92 S. Ct. 2701, and *Perry* v. *Sinderman*, 92 S. Ct. 2694 (1972) in seeking hearings prior to discipline; (2) other decisions concerning the right to a hearing; (3) notice, and the nature of the hearing, with more specific discussions of notice, the requirement of an impartial decision-maker, confrontation and cross-examination and "abbreviated" hearings; (4) a system's violation of its own rules; (5) challenging as vague the law or policy upon which discipline is based; (6) substantive due process arguments; (7) remedies; and (8) other issues.

1. The Board of Regents, Perry and Vail Cases

Board of Regents and *Perry* dealt with refusals to rehire college instructors, without explanation or hearing. The opinions indicate that the starting point in assessing a procedural due process claim is determining whether there is an "interest at stake" which is "within the Fourteenth Amendment's protection of liberty and property." *Regents, supra*, 92 S. Ct. at 2705-2706. Based upon an analysis of the respective hiring practices, the Court determined that allegations of a property interest in *Perry*, if established, would require officials to grant a hearing. 92 S. Ct. at 2700. Allegations in *Board of Regents* on this point were held inadequate.[2] The Court noted that, in general, where "protected interests are implicated the right to some kind of *prior* hearing is paramount." 92 S. Ct. at 2705 and n.7; (emphasis added).

The importance of the decisions here stems from the Court's elaboration in *Regents* of possible "protected interests." Four factors relevant to school exclusion cases emerge: (1) ". . . the right of the individual . . . to acquire useful knowledge...." 92 S. Ct. at 2707, quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 399; (2) ". . . any charge against him that might seriously damage his standing and association in his community.... [his] good name, reputation, honor or integrity...." *Id.*; (3) . . . a stigma or other disability that forclosed his freedom to take advantage of other employment opportunities...." *Id.*; (4) an interest "from an independent source such as state law...." 92 S. Ct. at 2709.

In *Vail* v. *Bd. of Ed.*, 354 F. Supp. 592 (D.N.H., 1973), the court followed the approach outlined in *Regents*, holding that "written specification of charges, notice, and a full prior hearing" must precede an expulsion or suspension of more than five school days. 354 F. Supp. at 603. In identifying the protected interest, the Court noted both the *Meyer-Board of Regents* reference to "the right . . . 'to acquire useful knowledge,' " and New Hampshire's compulsory attendance provisions. 354 F. Supp. at 602.

Board of Regents requires a significant injury, referring to a reputation "seriously damage[d]" and opportunities "foreclosed."[4] *Vail* illustrates the ways in which discovery can make concrete, in the school context, injury to *Board of Regents'* potential, protected interests. The opinion reads in part (354 F. Supp. at 603, n. 4):

> In addition to a suspended student receiving zeros for all work missed and being denied an opportunity to "make-up" the work, a copy of the notice of suspension is placed in the student's permanent record file. A lengthy or indefinite suspension may prevent the student from obtaining credit for a particular course or term and may well affect the grades received. In addition, the record of the suspension may jeopardize a student's future employment and educational opportunities as guidance counselors prepare student recommendations after having examined the student's permanent record file which contains the notice of suspension.

The evidence in *Vail* also demonstrated that the Harvard College application for admission, for example, inquires whether a student has "been dismissed or suspended from a school." The recommendations which counselors fur-

nish colleges, employers and the FBI are highly subjective.[5] *Vail* also demonstrates ways of buttressing a stigma claim. There, an "S" was placed on the daily absentee list next to the name of a student suspended and school personnel were aware of suspensions which they considered a punishment.[6]

Other cases support an argument that "collateral consequences" [*Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 341 (1969)] are significant in assessing the right to a prior hearing, referring both to stigmatization[7] and impact on future opportunities.[8]

2. The Right To a Prior Hearing

The other cases discussing the right to a hearing[9] prior to suspension differ in approach and result. The most favorable case for students is *Mills* v. *Bd. of Ed.*, 348 F. Supp. 866, 878 (D.C., 1972), which ordered a hearing prior to suspension "for any period in excess of two days...."

Five Fifth Circuit decisions deal with high school students' rights to hearings without identifying clearly the minimum sanction to which the requirement applies. These cases do not discuss "collateral consequences" of suspension such as impact on future opportunities and stigmatization. In *Pervis* v. *LaMarque Ind. Sch. Dist.*, 466 F.2d 1054 (1972), the court directed the expungement of suspensions, without prior hearings, from "February until May 4."[10] The court viewed the requirement "that punishment cannot be imposed before a hearing is given" as "the general rule." 466 F.2d at 1058. In *Black Students* v. *Williams*, 470 F.2d 957 (1972), the Court affirmed a district court's holding that a hearing was required prior to a suspension "for a substantial period" and that 10 days was such a period.[11]

Dicta in *Pervis* and *Black Students* indicate that "full compliance" with procedural safeguards is unnecessary when "the punishment to be imposed is minimal," and that

> it may be that a student can be sent home without a hearing for a short period of time if the school is in the throes of violent upheaval. But even in such a case, a hearing would have to be afforded at the earliest opportunity.... *Pervis, supra,* at 1058; see also *Black Students, supra,* 470 F.2d at 958.[12]

In *Murray* v. *West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438 (1973), the court in effect gave some content to "minimal" punishment by refusing to invalidate summary suspensions of "a few days...." In *Sullivan* v. *Houston Ind. Sch. Dist.*, 475 F.2d 1071 (1973), the court refused to vacate an injunction requiring notice and a "formal hearing" for suspensions of more than three days or an indefinite period. 475 F.2d at 1072-73, n.3, 1968. However, the court vacated decrees holding that the suspension which gave rise to the proceeding from which appeal was taken was violative of due process. Under the particular circumstances, the court found that (1) an initial 6 day summary suspension was by agreement of officials and plaintiff's father; and (2) further delay resulted from improper conduct by plaintiff. The court concluded that "[t]he hearing was held as soon as circumstances would permit." *Id.* at 1078.[13]

The Seventh and Eighth Circuits have upheld suspensions of 7 and 3 days (reduced from 5) respectively without prior hearings. *Linwood* v. *Bd. of Ed.*, 463 F.2d 763 (C.A. 7, 1972), cert. denied, 93 S. Ct. 475 (1972); *Tate* v. *Bd. of Ed.*, 453 F.2d 975 (C.A. 8, 1972). In *Linwood*, the court approved an Illinois law requiring safeguards only for suspensions in excess of 7 days. It viewed a 7-day suspension "for reasonably proscribed conduct" as a "minor disciplinary penalty...." 463 F.2d at 768. In a contrasting approach in *Tate*, the court "assumed arguendo that due process applies . . . (to) a mild . . . penalty," but found the procedure employed reasonable.

> Under the circumstances of the case before us, where there was no question as to what acts were involved or what individuals were involved, where notice was given and an opportunity for an informal hearing[14] was given, and where the penalty was mild, there was no violation of due process shown.... 453 F.2d at 979.

The *Linwood* court did not discuss the "collateral consequences" of the suspension; the *Tate* decision noted the absence of a contention that the system's grade reduction policy had adversely affected the complaining students.

In *Givens* v. *Poe*, 346 F. Supp. 202, 208 (W.D.N.C., 1972), the court stated that due process required a hearing prior to "expulsion or prolonged suspension from school." Thereafter, the court approved procedures proposed by the system providing for (1) an abbreviated hearing before the principal prior to suspensions not exceeding 10 days; and (2) a full hearing in the event of exclusions in excess of 10 days. Under the rules, the decision of the hearing officer could be made before the start of the eleventh day of a suspension. Suspension could precede a hearing "[i]f the behavior precipitating [it] place[s] the safety of school operations in jeopardy...." (unpublished order dated Nov. 1, 1972; copy available from the Center for Law and Education).

A decision similar to *Givens* is *Graham* v. *Knutzen*, 351 F. Supp. 642 (D. Neb., 1972); (unpublished order dated October 27, 1972, approving system proposal, available from the Center for Law and Education). In *Graham*, the court-approved proposal provides for a conference with the principal upon referral of a pupil in the case of all exclusions. Where the student disputes charges, the principal provides for the student's confronting school personnel with "primary knowledge." The principal may interview other pupils separately. However, the first opportunity for challenging charges following written notice does not occur until a parent conference is held, which, depending upon the severity of the sanction recommended, can be as many as 5 or 7 days after exclusion.

One case raises the hearing issue in connection with a transfer. In *Betts* v. *Board of Education*, 466 F.2d 629 (C.A. 7, 1972), a student who admitted causing two false fire alarms was transferred from a regular to a special high school where she could attend classes once a week, but not receive regular credit. Citing *Board of Regents*, *supra*, the court viewed her "interest in continuing her high school education" as protected. 466 F.2d at 633. The court noted that because of plaintiff's unequivocal admissions procedural protections were not essential for a determination of whether she activated the alarms, but concluded that:

> since a penalty which is tantamount to expulsion was involved, and since that penalty was discretionary rather than prescribed, the school authorities were plainly required to give the plaintiff and her parent some opportunity to present a mitigative argument. 466 F.2d at 633.

The court then approved a "hearing" held *after* plaintiff's exclusion from the regular program, an action probably justifiable under the emergency circumstances exception to the prior hearing rule.[15]

3. Notice and the Nature of the Hearing

The cases also differ substantially as to notice and the scope of the hearing. Three of the cases cited above provide for expansive safeguards. See *Mills* v. *Bd. of Ed.*, *supra*, 348 F. Supp. at 882-883; *Givens* v. *Poe*, *supra*, 346 F. Supp. at 209; and *Fielder* v. *Bd. of Ed.*, *supra*, 346 F. Supp. at 724, n. 1, 730-731. Each case, for example, recognized the right of a student to representation by counsel. The questions of notice, confrontation and cross-examination, an impartial decision-maker and "abbreviated" hearings are discussed in detail below.

Notice

In *Caldwell* v. *Cannady*, No. CA-5-994 (N.D. Tex., Order of Jan. 27, 1972) (Clearinghouse Review # 7424 A*), the court directed that notice include "a written specification of any and all charges relied upon as grounds for such expulsion, the names of the witnesses to be used at the hearing on such expulsion matter and a statement as to the nature of the testimony of such witnesses...." *Fielder*, *supra*, refers to "notice . . . at least three days before the hearing" (346 F. Supp. at 724, n.1) and to "a hearing . . . sufficiently after the giving of the notice to enable the student to prepare to respond to the reasons given (for the proposed expulsion)...." In contrast, *Center for Participant Education* v. *Marshall*, 337 F. Supp. 126, 136 (N.D. Fla., 1972), involved "written notice two days prior to the hearing...." The court ruled that "shortness of notice alone" would not invalidate student disciplinary proceedings and that "the totality of the circumstances point to a full and fair hearing...." The relief in *Mills*, *supra*, allowed

parents a postponement "for no more than five (5) additional school days where necessary for preparation." 348 F. Supp. at 882.

In *DeJesus* v. *Penberthy*, 344 F. Supp. 70 (D. Conn., 1972) a ninth grader was charged with assaulting another student in violation of a school rule. After plaintiff left the expulsion hearing, "[t]he Board shifted its focus to the question of whether the plaintiff was guilty of incorrigibly bad conduct, the standard of [another of the system's] regulations." The Board made no finding as to the basis of the expulsion which it directed. The court concluded that "it [expulsion] most likely rests solely on an unarticulated finding of incorrigibly bad conduct," and held that the expulsion must be voided since "on this charge, plaintiff had neither notice nor an opportunity to defend, a plain denial of due process." See 344 F. Supp. at 76-77.

In *Betts* v. *Board of Education, supra,*[16] the court held that school officials had provided "some opportunity to present a mitigative argument." A school official telephoned plaintiff's mother on the day of the incident and asked her to be at the school the next morning to discuss the matter. At the conference, the official first suggested a transfer to the once a week, non-credit, special school. "Despite Mrs. Betts' protestations, Goldie's transfer was immediately effectuated." The court somehow characterized this procedure as involving "adequate notice of the charges . . . sufficient opportunity to prepare for the meeting . . . (and) an orderly hearing...." In the court's view, the facts indicated ". . . a full chance to contest the transfer to Simeon (special school) on and after April 20th...." 466 F.2d at 633. This decision is difficult to support. For example, it appears that the timing of the hearing precluded plaintiff from securing the assistance of an attorney or social worker or advancing arguments based upon a study of the appropriateness of the special school program for plaintiff.[17]

Impartial Tribunal

In *Caldwell* v. *Cannady, supra,* a student indicted for possessing marijuana was expelled pursuant to a system rule, without a hearing. The court found that some school officials had discussed the matter with prosecuting officials, investigating officers and grand jury members at or about the time of the indictment. Characterizing the school board as an "adversary" in the federal suit and various members as "so directly involved,"[18] the court held that to satisfy the requirement of "an impartial hearing" an original hearing must be held by the state commissioner of education.

A suspension for "persistent disobedience" was invalidated for non-compliance with the requirement of "an impartial decision-maker" in *Bd. of Ed.* v. *Scott,* C.A. No. 176-814 (Circ. Ct. of Wayne County, Mich., Opin. on Counterclaim, Jan. 12, 1972) (Clearinghouse Review #7380C).[19] The court held: "The fatal error in this proceeding was that in the initial suspension hearing the man who served as judge [school principal] was also the principal accuser and chief witness respecting two of the most important charges upon which suspension was predicated." This defect was not cured in "review hearings . . . rely[ing] mainly upon a lifeless printed record." In dicta, the court stated that the principal would have been a proper hearing officer on the charges as to which he was not the principal accuser and witness, and that the regional superintendent, regional board and central board all appeared to qualify as impartial review tribunals. Mem. Op. at 9-11, 14-15.

In six other cases, students' contentions failed. A hearing conducted by the dean of the University of Connecticut's Office of Men's Affairs was challenged in *Winnick* v. *Manning,* 460 F.2d 545, 548-549 (C.A.2, 1972). The court held that the requirement of "an impartial decision-maker" satisfied, finding an absence of proof of "overt bias or prior involvement...."[20] The facts that the dean was a member of the office which began the suspension proceedings and that he held an "administrative post" were insufficient to make out a claim; the court concluded that "fair treatment" of those charged was as much a concern of university officers as "upholding 'order.' "[21] Similarly, a blanket challenge to a statute authorizing hearings by the superintendent was rejected in *Murray* v. *West Baton Rouge Parish Sch. Bd., supra.* Such hearings were viewed as "presumptively, adequate," although a violation of due process could occur if "the superintendent was biased or in any way unable to function fairly as a trier of fact...." 472 F.2d at 443. After *Murray,* in

Sullivan v. *Houston Ind. Sch. Dist., supra,* a Fifth Circuit panel concluded that it was improper for a principal to conduct a hearing where charges were framed "largely in terms of a personal confrontation" between a student and the principal. The defect was cured, however, by "two extensive *de novo* appellate hearings...." 475 F.2d 1077.[22]

See also *Sill* v. *Penn State University,* 462 F.2d 463, 469-470 (C.A. 3, 1972) (disciplinary proceedings conducted by specially appointed panel, rather than pre-existing faculty-administrator-student judicial board, upheld as "reasonable exercise of the power vested in the board of trustees;" the court refused to consider "the motives which prompted the creation of the board or the selection of its membership...."); *Herman* v. *University of South Carolina,* 341 F. Supp. 226, 232-234 (D.S.C., 1971), aff'd, 457 F.2d 902 (C.A. 4, 1972) (initial proceeding conducted by special committee established by board of trustees rather than pursuant to "normal . . . procedure under the University Rules . . .;" appeal heard by board of trustees, some of whose members had sat on special committee); *Center for Participant Education* v. *Marshall,* 337 F. Supp. 126, 135 (N.D. Fla., 1972) (student charged with violating university president's executive order indefinitely dismissed from university by the president following hearing; university honor court and student supreme court had found for the student at earlier stages of the process; no fundamental unfairness since "decision . . . free of extraneous political pressures and personal prejudice and was made on the basis of substantial evidence....").

In sum, holdings and dicta support student claims where a prospective hearing officer was "involved" in the particular case. Using this standard, a different result could well have been reached in the *Center for Participant Education* case. In contrast, courts have rejected the view that administrators are necessarily administration oriented and, therefore, biased. Such claims should be fleshed out by discovery showing the particular relationship between the hearing officer and other administrators. If, for example, the hearing officer works in the superintendent's office and depends for his daily assignments and indeed his employment on the superintendent, is he free enough to oppose the superintendent's position on a disciplinary matter?

The *Center for Participant Education* decision employs a questionable approach in rejecting an impartiality claim on the view that "substantial evidence" supported the defendant's decision. Impartiality is important because the hearing officer can make rulings which affect the outcome, but which are essentially non-reviewable. For example, by using the "substantial evidence" standard, the district judge indicated he would accept the defendant's decision on close factual questions, even if he would have decided differently. This shows the need for impartiality, rather than the fulfillment of the requirement of impartiality, effectively eliminating impartiality as a requirement. If a finding is clearly wrong, it may be reversed on that ground.

Confrontation and Cross-examination

Two cases arising in the Second Circuit illustrate that decisions on appropriate procedures will often depend on the particular facts.[23] In *Winnick* v. *Manning, supra,* the Court of Appeals for the Second Circuit concluded that the failure to permit cross-examination of a witness did not require the invalidation of a suspension. The court stated that cross-examination "generally has not been considered an essential requirement . . . in school disciplinary proceedings," and held that the facts of the case did not warrant an exception. The court stressed that in view of admissions by the plaintiff the case did not involve" a problem of credibility...." 460 F.2d at 549-550.

In *DeJesus* v. *Penberthy, supra,* plaintiff assaulted another pupil, and was expelled following a hearing at which evidence against plaintiff was presented by reading from written statements of two students who were not present at the hearing. These statements conflicted with plaintiff's on the "critical issue" whether there was provocation for plaintiff's action. While stating that confrontation and cross-examination should not always be required, the court held that their absence in this instance denied due process (344 F. Supp. at 76):

> Since critical facts were in dispute and since their resolution could lead to expulsion, the lack of confronta-

> tion and cross-examination, in the absence of any justifying circumstances, denied plaintiff due process of law.

The opinion details the factors which would justify omitting confrontation and cross-examination, and safeguards for the accused students in such cases. 344 F. Supp. at 76.

Other cases provide for confrontation and/or cross-examination. *Givens* v. *Poe, supra,* 346 F. Supp. at 202; *Fielder* v. *Bd. of Ed., supra,* 346 F. Supp. at 730 (". . .a hearing . . . at which cross-examination can be conducted of the person or persons primarily aware of the reasons being leveled for the proposed expulsion."); *Mills* v. *Bd. of Ed., supra,* 346 F. Supp. at 883. *Graham* v. *Knutzen, supra,* requires confrontation and cross-examination of "teacher or administrator witnesses or accusers," but not students; the court relied upon the danger of reprisal. 351 F. Supp. at 666.

Abbreviated Hearings

In several cases, courts, while declining to require elaborate hearing procedures for short suspensions, have provided more limited protections. See *Vail* v. *Bd. of Ed., supra,* 354 F. Supp. at 603; *Givens* v. *Poe, supra,* unpublished order, Nov. 1, 1972; *Graham* v. *Knutzen, supra,* unpublished order, Oct. 27, 1972; *Bd. of Ed.* v. *Scott, supra,* C.A. No. 176-814 (Circ. Ct. of Wayne County, Mich., Opin. on Counterclaim, Jan. 12, 1972, at 7-8, dictum) (Clearinghouse Review #7380C).

In *Vail, supra,* for example, the court required that suspensions for not more than five days be preceded by

> an informal administrative consultation . . . so that the student can know why he is being disciplined and so that the student can have the opportunity to persuade the school official that the suspension is not justified, e.g., that this is a situation of mistaken identity or that there is some other compelling reason not to take action. 354 F. Supp. at 603.

In the case of suspensions not exceeding ten days, the system rules approved in *Givens, supra,* provide for an investigation of the incident by the principal, notice of the offense and a conference where the student is given a report of the testimony and an opportunity to present a defense including written records and witnesses. In effect, these courts are finding a protected interest and devising procedures on the premise "that the quantum and quality of procedural due process to be afforded a student varies with the seriousness of the punishment to be imposed." *Pervis* v. *LaMarque Ind. Sch. Dist., supra,* 466 F.2d at 1057.

4. A System's Violation of Its Own Rules

Two cases rely upon a system's violation of its own rules in finding a violation of procedural due process. *Caldwell* v. *Cannady,* CA-5-994 (N.D. Tex., Jan. 25, 1972) (Mem. op. at 4) (Clearinghouse Review #7424B); see also 340 F. Supp. at 839; *Dunn* v. *Tyler Ind. Sch. Dist., supra,* 460 F.2d at 143-144, 148. A similar argument was rejected in *Winnick* v. *Manning, supra,* where the court declined "to hold that every deviation from a university's regulations constitutes a deprivation of due process," and noted that "the alleged deviations . . . did not constitute in themselves a denial of due process" and that they were "minor ones and did not affect the fundamental fairness of the hearing." 460 F. Supp. at 550.

The cases may be read as holding that a violation of a system's rules denies due process only when the omitted action was itself constitutionally required (a factor noted in the quoted excerpt from the *Winnick* case). For example, in *Caldwell* v. *Cannady, supra,* the court stated (Mem. op. at 4):

> It appears that the school board has failed to follow its own rules in expelling the plaintiff and has thereby denied him due process of law, violating his rights under Articles Five and Fourteen of the Constitution of the United States. Certainly, the minimum procedural due process to which James Caldwell was entitled is that set forth in the rules of the school board itself; but even in the absence of such rules, due process would require notice, preferably including a statement of the nature of the charges and the names of the witnesses involved,

> and a complete hearing after the student has had reasonable time to prepare his defense.

Nevertheless, such violations should be established given the tendency of some courts to discuss the overall fairness of proceedings.

In *Sill* v. *Pennsylvania State University* and *Herman* v. *University of South Carolina*, *supra*, disciplinary proceedings were conducted by specially appointed panels rather than pre-existing boards, actions which could have been challenged under the rubric of a system's violations of its rules. A system should not have an opportunity to substitute a panel likely to be more favorable to its views.

5. Challenging the Underlying Law or Policy

Students have frequently — and without success — challenged the underlying law or policy upon which discipline was based as unconstitutionally vague. Two types of vagueness claims are possible. Due process requires that laws give reasonable notice of conduct subject to sanction. Second, where free speech activity is arguably involved, students may invoke cases requiring precision of regulation in this area. See generally *Grayned* v. *Rockford*, 92 S. Ct. 2294, 2298-2299 (1972). Most of the cases discussed here have dealt with "due process" rather than "First Amendment" vagueness. In recent decisions, only dicta provide support for students.

In *Linwood* v. *Board of Education*, *supra*, plaintiff, expelled for assaulting another student, challenged as vague an Illinois law authorizing expulsion and suspension for "gross disobedience or misconduct." The Seventh Circuit panel stated (463 F.2d 768):

> [T]his general standard, although insufficient in and of itself to operate as a rule to govern the actions of students, is adequate to guide the local school board in defining the specific acts for which it proposes to apply the sanctions of suspension or expulsion.

The court then noted that the local system's rule "defined physical assault as gross disobedience or misconduct...." 463 F.2d at 768.[24]

The *Linwood* court stopped short of holding that there must always be a valid written rule. "[W]e do not hold that a student would have standing to challenge Sec. 10-22.6 if he has committed misconduct truly gross by any standard." *Id.* The court applied this *caveat* in the *Betts* case, *supra*, where plaintiff had caused false fire alarms. It termed this "'truly gross by any standard,' so that [plaintiff] cannot complain that the statutory terms 'gross disobedience [or] misconduct' . . . were unconstitutionally vague in the absence of defining rules...." 466 F.2d at 635.[25] See also *Graham* v. *Knutzen*, *supra* (rejecting as a request for "usurp[ing] the control of the educational environment" a prayer for "specific standards of Conduct" to be the basis for expulsion. 351 F. Supp. at 669).

Students' vagueness arguments have not fared better where First Amendment activity was arguably involved in the conduct leading to exclusion from school. In *Dunn*, *supra*, where black students left school to protest cheerleader selection in a newly integrated school, the court majority termed error the district court's view that the students' conduct "was permissible . . . unless specifically covered by a valid regulation." While stating that "[n]o student needs a regulation to be told he is expected and required to attend classes," the court also recognized that "[t]here are grey areas of conduct for which the student needs the guidance of a regulation telling him what is allowable and what is not." Alternatively considering the regulation, the court viewed "boycott" and "walkout" as "fully descriptive ...." 460 F.2d at 142. See also *Sill* v. *Penn State University*, *supra* at 462 F.2d 467-469 (sit-in; vagueness doctrine applicable, but code need not satisfy "same rigorous standards . . . as . . . criminal statutes"); *Center for Participant Education* v. *Marshall*, *supra*, 337 F. Supp. at 132-134 (teaching of class; plaintiff cannot challenge vagueness of executive order where he knew his actions would constitute disobedience).

Finally, in a section of its opinion headed "First Amendment Vagueness," the Fifth Circuit rejected a challenge to Louisiana's disciplinary statute in *Murray* v. *West Baton Rouge Sch. Bd.*, *supra*. The students who had "convene[d] their own assembly during school hours" argued that the law gave "authorities too much leeway . . . [and] could easily be used arbitrarily to infringe on protected . . . activities ...." 472 F.2d at 441, 443. The opinion reads in

part (472 F.2d at 442):

> The statutory proscriptions at issue here are unquestionably imprecise. It is clear, however, that school disciplinary codes cannot be drawn with the same precision as criminal codes and that some degree of discretion must, of necessity, be left to public school officials to determine what forms of misbehavior should be sanctioned. Absent evidence that the broad wording in the statute is, in fact, being used to infringe on First Amendment rights, *cf. Tinker* v. *Des Moines Ind. Community School Dist.*, 1969, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731, we must assume that school officials are acting responsibly in applying the broad statutory command. See generally, *Karr* v. *Schmidt*, 5 Cir. 1972, 460 F.2d 609....

6. Substantive Due Process Arguments

The value of efforts directed to procedures may be questioned. Only false hopes and wasted resources may result if a litigation victory produces a suspension by impeccable procedures. Beyond the hope that some students will be able to establish that punishment is inappropriate, a procedural victory may have three possible benefits: (1) where a student was suspended without a hearing, any possible system interest may be vindicated, the only result being the expungement of a record, see *Pervis, supra*, 466 F.2d at 1058; (2) hearing panels might be so constituted (for example, including students) and have sufficient flexibility, so that less severe sanctions would be imposed; and (3) substantial procedural safeguards might lead officials to forego seeking suspension in most instances.

There can be no doubt, however, that substantive approaches are important. Free speech and equal protection guarantees will be available in some cases. But what rules govern official actions where these protections are unavailable (e.g., a ten-day suspension for smoking where there is no danger of fire)? Several cases suggest a substantive due process approach. Such challenges will likely confront a difficult standard, i.e., showing that system actions are unreasonable: *Caldwell* v. *Cannady, supra*, 340 F. Supp. at 838; *Paine* v. *Board of Regents*, 355 F. Supp. 199, 204 (W.D. Tex., 1972); *Herman* v. *University of South Carolina*, 341 F. Supp. 226, 232 (D.S.C., 1971), affirmed, 457 F.2d 902 (C.A. 4, 1972) (permanent suspension following sit-in "not unreasonable"); see also *DeJesus* v. *Penberthy, supra*, 344 F. Supp. at 74 (officials entitled to greater discretion on "merits" of a disciplinary matter than procedure).

Students prevailed in three cases with substantive due process approaches. In *Cook* v. *Edwards*, 341 F. Supp. 307 (D.N.H., 1972), the court invalidated on "substantive due process" grounds the indefinite expulsion of a student who arrived at school intoxicated. The opinion balances the competing interests of the student and system. The court noted "that a public school education through high school is a basic right of all citizens," that the "indefinite expulsion may be the end of the plaintiff's scholastic career" and based upon certain proof, the "probab[ility] that the plaintiff will suffer some psychological and mental harm...." In contrast, the court found "no showing that Conant School will suffer any harm if the plaintiff is reinstated pending a final hearing" despite two prior suspensions and the superintendent's testimony that reinstatement would have a harmful effect on the system's efforts to combat alcohol and drug problems. The court also noted that the expulsion seemed inconsistent with a system policy.

A similar approach was followed in *In Re Anonymous*, C.A. No. 3624-N (M.D. Ala., bench ruling, Mar. 21, 1972) (copy available from the Center for Law and Education) holding unconstitutional, as applied, a policy requiring the withdrawal from school of pregnant students. The court ruled that plaintiff had a "constitutional right to receive a public education" and that the system must "justify" any deprivation. The court found that plaintiff had a "credible school record," would be pregnant for only four months by the end of the term and that it would be "to her best interest" and important to her "psychological well-being" to continue in a normal program. The court rejected the purported justifications: "gossiping or kidding her" as not weighty

enough, "health and safety" as involving a matter for decision by a guardian; and advancement of "good morals and the principles of good citizenship" as "retribution" and not supported by the evidence.[26]

In *Paine* v. *Board of Regents, supra,* the court invalidated on due process and equal protection grounds a policy requiring automatic suspension from the university system for 24 months solely on the basis of a conviction on a narcotics charge. In the case of other crimes and misconduct, exclusion was not automatic, a student being entitled to a full hearing before a panel which at one campus consisted of three faculty members and two students. At this hearing, a student could attempt to establish "mitigating circumstances" and the panel could impose a variety of sanctions.

The court identified the system's interests as protecting other students from narcotics and providing a quality education to all students. It stated the legal standard, as follows (355 F. Supp. at 204):

> The presumption that must withstand the test of reasonableness in this case is that plaintiffs and all other students finally convicted or placed on probation for drug or narcotic offenses will influence other students to use, possess or sell drugs or narcotics unless they are suspended from the university for a period of 24 consecutive months following their convictions.

In finding this requirement not satisfied, the court emphasized that the students affected were those placed on probation, and thereby found to be "fit subjects for rehabilitation... [whose] freedom poses no risk to the community at large." 355 F. Supp. at 205. A student must be given an opportunity "to show that despite [conviction or probation] he poses no substantial threat [to]...other students...." *Id.* Focusing on the distinctive treatment of narcotics offenders, the court also found a violation of the equal protection clause in the according of " 'bedrock procedural rights to some, but not all similarly situated,' *Stanley* v. *Illinois*...." 355 F. Supp. at 206.

Another Texas district court upheld as reasonable a school system rule requiring expulsion of students selling, using or possessing any dangerous or narcotic drug. *Caldwell* v. *Cannady, supra.* The policy did not require that possession be on school grounds or otherwise school related, and the actions of the four plaintiffs did not directly involve the school. The court reasoned as follows (3 F. Supp. at 838):

> It is obvious to this Court that the possession, or certainly the use of drugs by students could have an adverse effect on the quality of the educational environment in a school of any level, but particularly so when children high school age or younger are involved. This Court therefore holds that the enactment of a policy which prohibits student possession of dangerous drugs, as defined by the Legislature of the State of Texas, is a reasonable exercise of the power vested in this local school board.

Paine and *Caldwell,* each purporting to apply a test of reasonableness, provide an interesting contrast. The former searches for a relationship as to "all . . . students" and the latter upholds a policy because it is "obvious" what "could" occur. *Paine* requires a very close relationship to the school program; *Caldwell* ignores that issue, in effect allowing school officials to add an additional punishment to that of the criminal process.

Arguments similar to the substantive due process grounds discussed here could be made in state courts. For example, in Opinion No. 68-061 the Ohio Attorney General ruled that systems could not exclude an unmarried pregnant student, unless attendance would be detrimental to her physical safety or well-being. The opinion, in effect, concludes that the policy of the compulsory attendance law is overriding and that exceptions must be narrowly limited. ("The only exceptions are statutory and pregnancy is not an exception per se....") Manifestly, this approach will be available in most states.

Substantive due process is one tool, to consider where the court is activist, not a panacea. The limits of its acceptability emerge from the realization that the late Justice Harlan urged its use in certain criminal procedure cases where all other justices used an equal protection approach. See *Williams* v. *Illinois,* 399 U.S. 235, 260 (1970).

7. Remedies

Unlawful suspensions have been ordered expunged from school records. *Pervis* v. *LaMarque School District, supra,* 466 F.2d at 1058; *Dunn* v. *Tyler Independent School District, supra,* 460 F.2d at 146-147; *Caldwell* v. *Cannady, supra,* C.A. 5-994 (Order, Jan. 27, 1972, at 2) (Clearinghouse Review #7424A).

In *Vail* v. *Board of Education, supra,* the court ordered expungement of school records on behalf of the named plaintiffs, identified members of the class and any members of the class identified subsequently by an examination of records. Notice was required to students whose suspensions were expunged. The court ordered that plaintiff's counsel be allowed to participate in the effort to identify additional class members and to inspect records to insure compliance with the decree. Finally, the court ordered district officials to study and report to the court the impact on grades of the policies of awarding zeros and refusing to permit make-up work because of suspensions. The report was also required to cover the feasibility of adjusting grades affected. See 354 F.Supp. at 604. While expungement in *Vail* was based upon the First Amendment, the same remedies should be available where suspensions are voided on procedural due process grounds.

In *DeJesus* v. *Penberthy, supra,* the court voided an expulsion and granted leave to plaintiff "to reapply . . . for an order of reinstatement unless the Board holds a new hearing within ten (10) days...." 344 F. Supp. at 78. While this is generally an unsatisfactory approach, it is a possible compromise position where a court appears reluctant to rule for a student.

8. Other Issues

Class actions have been approved in *Givens* v. *Poe* and *Vail, supra,*[27] and rejected in *Fielder, supra,* 346 F. Supp. at 727-728.

The courts have exhibited an unwillingness to consider related state law claims under the doctrine of pendent jurisdiction.[28] Claims were ruled upon reluctantly, and rejected in *Betts* v. *Board of Education, supra,* 466 F. Supp. at 634-635. In *Winnick* v. *Manning, supra,* 460 F.2d at 550, and *DeJesus* v. *Penberthy, supra,* 344 F. Supp. at 78, courts declined to consider pendent claims.

Since some state statutes deal with suspension and expulsion, it may become necessary to consider the necessity of a three-judge-court pursuant to 28 U.S.C. 2281. In *Pervis* v. *LaMarque Ind. School District, supra,* the court held the requirement of a three-judge-court inapplicable, ruling one argument "insubstantial" and the other a challenge to the manner in which officials exercised discretion granted by a statute, not a statutory mandate. See 466 F.2d at 1057-1058. See also *Murray* v. *West Baton Rouge Parish Sch. Bd., supra,* 472 F.2d at 441; *Fielder, supra,* 346 F. Supp. at 729. In some cases, the issue has not been discussed, although the validity of a statute was considered, e.g., *Linwood* v. *Board of Education, supra.*[29]

In *Caldwell* v. *Cannady, supra,* the court invalidated certain suspensions because evidence utilized by school officials had been secured in searches of autos by police. These searches were held by the court to violate the Fourth Amendment. 340 F. Supp. at 839-840. The court also held that, in a school disciplinary proceeding, a student's invoking his Fifth Amendment privilege to remain silent could not be considered an admission of guilt. 340 F. Supp. at 840-841.

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*Copies of materials referred to with Clearinghouse Review #s may be obtained from the National Clearinghouse for Legal Services, Northwestern University Law School, 710 North Lake Shore Drive, Chicago, Illinois 60611 (312) 943-2866.

Footnotes

[1] For earlier discussions, see R. Butler, "The Public High School Student's Constitutional Right to a Hearing," 5 Clearinghouse Review 431 (1971), P. Lines, "The Case Against Short Suspensions," 12 Inequality in Education 39 (1972).

[2] 92 S. Ct. at 2710. In *Perry,* the Court also held that allegations that dismissal resulted from protected speech activity must be fully explored, whether or not plaintiff had a contractual or tenure right to reemployment. 92 S Ct. at 2698.

[3] As emphasized below, future *educational* opportunities will also be a focal point in a school exclusion case.

[4] See also 92 S. Ct. at 2707-2708, n. 13.

[5] On deposition, a guidance counselor described inquiries from schools and employers as relating to "personal character . . . sense of responsibility and so forth." The FBI asked: "What kind of fellow was he. Was he one you could depend upon...."

[6] Our experience at the Center suggests that the situation in *Vail* is typical. Variations on the theme make discovery in the particular system important. For example, some systems deduct points from a student's average for each day missed during a suspension. See *Tate* v. *Bd. of Ed.*, 453 F.2d 975, 979 (C.A.8, 1972).

[7] *Breen* v. *Kahl*, 296 F. Supp. 702, 707 (W.D. Wisc., 1969), aff'd, 419 F.2d 1034 (C.A. 7, 1969); see also *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971).

[8] *Dunn* v. *Tyler Ind. Sch. Dist.*, 460 F.2d 137, 148-149 (C.A.5, 1972) (dissenting opinion of Rives, J.); see also *Hatter* v. *Los Angeles City High School District*, 452 F.2d 673,674 (C.A. 9,1971); *Winnick* v. *Manning*, 460 F.2d 545, 548, n.3 (C.A.2, 1972); *Shanley* v. *Northeastern Ind. Sch. Dist.*, 460 F.2d 960, 967 n.4 (C.A.5, 1972).

[9] "Hearing" is used here to describe not a school official's brief explanation of why a student has been suspended but an opportunity for a student, before a suspension, to present arguments and evidence after written notice of charges and adequate time for preparation. As the subsequent discussion shows, the decisions vary as to the manner in which these and other safeguards apply

[10] See also *Fielder* v. *Bd. of Ed.*, 346 F. Supp. 722, 728 (D. Neb., 1972) (expulsion without prior hearing improper).

[11] *Pervis* articulates the need for a prior hearing, noting: "Suppose at the subsequent hearing that appellants had been vindicated. How, then, could they have been made whole? They would have lost some three months of education." 466 F.2d at 1058.

[12] The second qualification recognized the traditional exception for emergency circumstances *Board of Regents* v. *Roth*, *supra*, 92 S Ct at 2105, n.7, *Mills* v. *Bd. of Ed.*, *supra*, 348 F Supp at 883; *Fielder* v. *Bd. of Ed.*, *supra*, 346 F. Supp. at 729-730.

[13] In *Dunn* v. *Tyler Ind. Sch. Dist.*, 460 F.2d 137 (1972), the court invalidated suspensions as inconsistent with the system's written rule Judge Rives dissenting read certain dicta in the majority opinion as "conced[ing] that for greater punishment than suspension for three days the more formalized procedure is necessary to meet due process requirements." *Id.* at 150. The majority's language was unclear. *Id.* at 144.

[14] I.e., after students were informed of their suspensions, they were offered a "question and answer period" with officials which was terminated because of the loudness and unruliness of the suspended students. 453 F.2d at 979.

[15] See *supra* note 12

[16] The facts are summarized Section 2, *supra*.

[17] The opinion manifests some uneasiness with the result reached. First, the court repeatedly asserted that it could find no prejudice to plaintiff resulting from the speedy "hearing." Second, the court emphasized that the matter had been heard on request for preliminary injunction and that evidence at trial might warrant relief.

[18] In a subsequent opinion, the court described the involvement as follows: ". . . members of the board had themselves been prosecuting and investigating this case before local authorities and members of the . . . grand jury ...." 340 F. Supp. at 839.

[19] In the Detroit system, "suspension" referred to exclusion from one school and transfer to another. The court viewed this as a serious sanction. (". . . [P]ermanent removal . . . from the closest and most convenient school or from the school of his choice . . . destruction of . . . relationships with his student peers . . . disruption of course content in the sense continuity is unlikely to be attained...." Mem. Op. at 8-9.)

[20] The court articulated the standard for involvement as follows (460 F.2d at 548): "Furthermore, there is nothing in the record which indicates that Dean Manning observed, investigated or made any prehearing decisions about Winnick's conduct at the disruption of the examination. In short, Dean Manning did not have such prior official contact with Winnick's case as to give rise to a presumption of bias. See *Wasson* v *Trowbridge*, *supra*, 382 F.2d at 813."

[21] The court also refused to invalidate a preliminary suspension challenged "because . . . the chief complaining witness was also the judge and the jury." The court found a lack of prejudice· key facts were admitted and any irregularities were cured by a later hearing *de novo*. 460 F 2d at 549.

[22] In *Graham* v. *Knutzen*, *supra*, the court refused to direct hearings by a person "outside the administrative personnel of the Omaha School System," reasoning that this would remove control of the system from the responsible officials 351 F. Supp. at 669.

[11] Each case cites the following language in *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961): "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

[12] See also *DeJesus* v. *Penberthy*, *supra*, 344 F. Supp. at 77-78 (rejecting vagueness challenge to statutory standard of "conduct inimical to the best interests of the school" although "not insubstantial," since local board's regulation described prohibited conduct with the word "assault"); and *Pervis* v. *LaMarque Ind. Sch. Dist.*, *supra* 466 F. 2d at 1057 (term "incorrigible" is "...adequately fleshed out" in the next section of education code).

[13] A similar standard was applied in *Fielder*, *supra*; the opinion reads in part: "[B]ecause of the regulation, previous disciplinary actions against them, and the common understanding of every student who reaches high school status – [plaintiffs] knew or reasonably should have known that repetitive skipping of classes, absences from school, and skipping of detention, which are subjects of regulation, might lead to disciplinary sanctions, including expulsion." 346 F.Supp. at 729.

[14] Dissenting in *Herman* v. *University of South Carolina*, *supra*, Judge Craven suggests that at least where First Amendment activity is involved "at some point punishment can become so wholly disproportionate to conduct that it either lacks a rational relationship or indicates a motive for the imposition of the sanction other than concern for the orderly process of education." 457 F. Supp. 903. *Mills* v. *Bd. of Ed.*, *supra*, 348 F. Supp. at 882 appears to require that during periods of suspension "alternative educational opportunities . . . be available...." In *Graham* v *Knutzen*, *supra*, court held that school officials deny due process if they fail to give notice of their final decision and "such procedures, if any, to be complied with before reinstatement;" the court reasoned that such a failure "denies the child his rights to attend school, either in public school or an appropriate institution if he is found incorrigible." 351 F. Supp. at 668.

[15] The courts described the class as follows. *Givens*: "... students who have been or may be excluded from school or suspended for substantial periods of time without a prior due process hearing." 346 F. Supp. at 203; *Vail*: "... all of those students similarly situated to the named plaintiffs.' 354 F. Supp. at 595. *Givens'* inclusion of students who "may be" subjected to challenged policies finds support in the note accompanying the revision of Rule 23, Fed Rules of Civil Procedure. See 3B *Moore's Federal Practice*, para 23.01 [10.-2].

[16] For a general discussion of pendent jurisdiction see C Wright, *Law of Federal Courts*, at 62-65.

[17] See generally C. Wright, *Law of Federal Courts* at 188-196.

Photo Gail Levin

Student May Sit When Others Salute

Goetz v. *Ansell* _ F.2d _ (C.A.2, April 19, 1973).

In *Goetz* v. *Ansell* a high school student asserted a First Amendment right to sit quietly during the flag salute. The system offered the option of leaving the room or standing silently, with suspension the sanction for noncompliance. *Held:* the system's rule cannot be squared with *West Virginia St. Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943) and *Tinker* v. *Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969). The court reasoned: (1) standing is like saluting or uttering words, a gesture of acceptance, which "cannot be compelled over ... deeply held conviction," and leaving the room may reasonably be viewed by some as a punishment; (2) the record contains no evidence of disruption or disorder or invasion of the rights of others. [For related cases, see *Frain* v. *Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969) (same rule).]